MICHIGAN SUPREME COURT

PUBLIC HEARING
SEPTEMBER 16, 2015

_____

CHIEF JUSTICE YOUNG: Good morning. This is the first public congregate meeting of the Court this term, and I would be remiss if I didn't acknowledge that it is also the last meeting - public meeting - that my colleague and good friend Mary Beth Kelly will be with us.

JUSTICE KELLY: Thank you – you could actually let me be the acting chief judge today.

CHIEF JUSTICE YOUNG: Not going to happen.

JUSTICE KELLY: That'd be kind of fun, huh?

CHIEF JUSTICE YOUNG: Not going to happen, you've got to stay on the Court to do that. But I wish you well in your new career and-

JUSTICE ZAHRA: I support that motion [inaudible]

JUSTICE KELLY: Thank you.

JUSTICE ZAHRA: I support-

[LAUGHTER]

CHIEF JUSTICE YOUNG: I will say, before we go, that the number of subscribed speakers is extraordinarily high and because of that we are going to strictly adhere to the three minute rule, right Chief?

JUSTICE KELLY: Sure.

CHIEF JUSTICE YOUNG: Go for it.

ITEM NO. 2 (2013-26; MCR 7.209)

JUSTICE KELLY: So with that, we have no speakers for the first item, so we'll turn to the second item and we'll welcome to the podium Attorney Gaetan Gerville-Reache with Warner Norcross. Thank you, I really appreciate this, this is fun.

MR. GERVILLE-REACHE: Good morning.

JUSTICE KELLY: Good Morning.

MR. GERVILLE-REACHE: I'm sorry to get you off on the wrong foot with the name that's so hard to pronounce.

JUSTICE KELLY: No, that's fine.

JUSTICE ZAHRA: That's the only reason he ceded the chair.

[LAUGHTER]

MR. GERVILLE-REACHE: I bet it is, it's a nice little practical joke.

JUSTICE KELLY: Great so before we start, let's talk about what this item is. This is item number two on our administrative agenda.

MR. GERVILLE-REACHE Yes. MCR 7.209. There were two alternative proposals for amending that rule. I'm here on behalf of the counsel for the Appellate Practice Section. My name is Gaetan Gerville-Reache. We already submitted a comment so I'm not going to belabor that, I just want to –

JUSTICE KELLY: Right, the issue we're to consider is whether to adopt the proposed amendment to MCR 5.402 that would require a court that discovers a child under a guardianship may be an Indian child to schedule a hearing and conduct an investigation into that matter.

MR. GERVILLE-REACHE: That's item one.

JUSTICE KELLY: That's one? I'm sorry, I didn't think he was really going to let me do this.

[LAUGHTER]

JUSTICE KELLY: Item two, I'm sorry. So again, item two today is whether to adopt one of the two alterative proposed amendments to MCR 7.209. Alternative A, which would clarify that only a trial judge or the Court of Appeals may order a stay of proceedings. And of course, Amendment B would amend the rule so that filing the bond would automatically stay.

MR. GERVILLE-REACHE: The Appellate Practice Section submitted a comment already explaining why it supports Provision B and, in a few words, we think that's a transaction cost for the parties, and the judicial economy suggest that Alternative B should be chosen. I do want to emphasize that it's very important that this rule be clarified to understand how it relates to judgments entered before final judgment has been entered in the case. And so, the revisions we propose would help do that. That's all I have, unless the Court has any questions.

CHIEF JUSTICE YOUNG: That's really good. You're well within the three minutes.

JUSTICE MCCORMACK: You win, you win.

[LAUGHTER]

JUSTICE ZAHRA: You're welcome back any time.

[LAUGHTER]

JUSTICE KELLY: Ms. Speaker.

JUSTICE MARKMAN: You cannot use –

MS. SPEAKER: Good morning, Justices.

JUSTICE MARKMAN: You cannot use his unused time, you understand?

MS. SPEAKER: [LAUGHTER] I won't need it, Your Honor. Liisa Speaker on behalf of the Michigan Coalition of Family Law Appellate Lawyers. Regardless of which option of the proposed court rule is adopted by this court, if any - and personally I agree in civil cases that the proposal by the Appellate Practice section is very suitable - but we don't believe the court rule was designed to address domestic relation judgments and they should be exempted out from the court rule to have an automatic stay just by the mere posting of a bond in a domestic relations case. So that a stay could only be had if some judge on a trial court or appellate court weighs on the issue of whether to grant a stay or not and we've set forth our position in a letter to this Court in more detail. And if there's no questions, I will take my seat.

JUSTICE VIVIANO: Why is it that you think that the provisions of the amended – or, the proposed amended rule would

not be sufficient if an issue arose in a divorce case, for example?

MS. SPEAKER: Well in a – the way that the proposal is worded is that the stay would be automatic just by the mere posting of a bond, and so sometimes – well, the way the rule is worded is it refers to entry of money judgments or judgments. And there certainly are judgments that are entered in divorce cases such as a judgment of divorce, and sometimes those judgments include monetary provisions. Maybe the payment to one spouse for a business, maybe the payment of spousal support retroactively for various periods. But the issue with our Coalition of Family Law Practitioners is that there are many issues that arise in the context of a divorce case because we have two parties who have been married to each other and are trying to support their family and maintain separate households now, that wouldn't come up in a standard civil judgment context where you have one party who has obtained a judgment in the context of a jury case or what have you, so that if there is a stay it should not be automatic. We would like to have a judge weigh in on a decision to enter a stay or not and not make it automatic just by the mere posting of a bond. It's not clear that it would even apply because, again, it's not the same as a civil judgment, it's a judgment that may contain monetary provisions, but to the extent that a party could read it to mean that well, if the spouse that owns a business has to pay $200,000 dollars to his wife within a certain period of time and if he posts a bond he'll automatically get a stay, that's where the problem is, we want the judge – a judge – to weigh in on that because of the context of the judgment of a divorce or a domestic relations proceeding.

JUSTICE VIVIANO: Is the concern that the stay would then apply to all other aspects of a divorce judgment.

MS. SPEAKER: Not necessarily. I mean, I guess that is one concern, but the concern is that there are other issues in the context of a divorce where maybe one spouse needs to maintain a household, secure the house if there's issues with the mortgage, make sure the children have adequate support, and to have something be automatic just by the mere posting of a bond is a concern that it's going to really change the dynamics of the situation if there's one party who has the financial wherewithal to post a bond, which I don't know how many of you have dealt with this in private practice, but for individuals, it's actually fairly difficult to obtain a bond. And it may be the rare case, where an individual may be able to post a bond, we

don't want that to happen without a judge weighing in about whether it's appropriate for a stay pending an appeal in a divorce case.

JUSTICE KELLY: Thank you, Ms. Speaker. We appreciate your comments as well.

MS. SPEAKER: Thank you.

ITEM NO. 3 (2013-38; MRPC 1.5)

JUSTICE KELLY: We appreciate your comments, as well. Okay, we're going to move on to item number three which we did receive an awful lot of comments on, and we thank the bar for commenting both – all of the speakers that are here today, but know as well that the court received and reviewed a tremendous amount of comments on this issue. The third issue, which we will consider is whether to adopt one of the two alternative proposed amendments of MRPC 1.5, alternative A would prohibit results obtained or value added fees in divorce cases, alternative B would allow results obtained or value added in divorce cases. The first speaker is Mark Bank who is an attorney with the Law Office of John Schaefer. Good morning, Mr. Bank.

MR. BANK: Good morning, may I please the court. My name is Mark Bank, thank you very much for having me here today. I have been speaking on this issue, writing on this issue for many years and I also have the privilege of representing Mr. Fryhoff in the case that originally came before the court that was the precursor to this morning. I have four very quick messages, if I may, to deliver to the Court. One is I believe we need to focus on the correct terminology here in the correct lexicon. I think the appropriate language to be included in Proposal B is not enhanced fees or value added fees or bonus billing, I believe the proper term is "results obtained fees," consistent with the existing rule, and I will explain why in a moment. The second point is – I want to be clear what results obtained fees are. And these are agreed to by the attorney and the client; they are not imposed upon the client. It is a product of a discussion between the lawyer and the client –

JUSTICE KELLY: Can we interrupt you? Just because we've read your comments and this is an area that is so written on. You don't disagree that this issue really pertains to high-asset divorces. You wouldn't object to that characterization, would you?

MR. BANK: I would, respectfully, disagree. Because I think results-obtained fees, I think all of us at on point or another have been a party to it. Picture the situation where the client comes into the office at the conclusion of the case and puts the bill down on the lawyer's desk and says "I see how much time you spent on this case, but in light of the complexity –"

JUSTICE KELLY: Okay, let's just focus – are you mindful of the problems inherent in less sophisticated clients even in acknowledgement that their divorce attorney may have a lien on their house or a lien on their 401(k) and the problems inherent in that fee agreement?

MR. BANK: That there's a requirement that there should be something in the fee agreement? I'm sorry, I'm not sure –

JUSTICE KELLY: Yes. So if there's not clarity in the fee agreement where a client might enter into a fee agreement and a lien is on the house or the 401(k), and the client doesn't realize that?

MR. BANK: Yes, and my response, if I may draw a parallel, we allow a client and we don't have a concern that a client can go into a lawyer's office and sign up for a flat fee in a case where the client doesn't know – they're guessing how much time will be expended, they're guessing on how complex it will be, and they're guessing on the results obtained, yet there seems to be a concern that at the end of the case the client is not permitted to have that same discussion when the client knows at the end of the case how much time was expended, what the result obtained was, and how complex it was, and if the client was in a position to engage in that conversation at the beginning-

CHIEF JUSTICE YOUNG: But that's the point. You– If you agree to a flat fee up front, you know exactly what you're going to be paying, irrespective of how much time is invested. At the end of the case, unless you have orders of magnitude saying "if we get this result, you get– I get this fee, if we get this result, I get that fee," unless you have that kind of understanding, then the amount charged – whatever term you want to use, value added or results obtained – is entirely an innovation after everything's occurred, isn't it?

MR. BANK: I guess that would be true, but I guess at that point in the conversation, the client has–

CHIEF JUSTICE YOUNG: You say, "I want $300,000," I say, "no." Then what happens?

MR. BANK: The answer is no. Because it has to be agreed to by the lawyer and client. There is no imposing this on a client. This is an agreement. And the client is in a position at that time, and I apologize if I'm sounding redundant, because the client has so much more information available to them at the end of the case–

CHIEF JUSTICE YOUNG: No, I just want to understand. Your view is this rule says if the client disagrees to the results obtained, that's the end of the equation.

MR. BANK: Exactly.

CHIEF JUSTICE YOUNG: Okay, thank you.

JUSTICE KELLY: But if we're focused on the parlance, that is, the results obtained, and agreement around what the results – what that's going to mean at the beginning of the case, right? So, if the dialogue at the beginning of the case, you're going to focus on what the results obtained is going to mean at the end of the case, and we're talking about divorce, okay?

MR. BANK: Yes.

JUSTICE KELLY: Necessarily, we're going to be focused on the size of the estate, right?

MR. BANK: That's one factor to look at.

JUSTICE KELLY: Child custody, that's a factor.

MR. BANK: Could be a parenting time plan. It could be the amount of support, it could be just getting it done and getting peace of mind very quickly. Some people say there's a price to be paid for peace of mind, and to get this case done for me in three months and get it settled on favorable terms, rather than having a year-long wait and having a trial and an appeal, there's value to that. There's value to that they can only, I believe, best assess at the conclusion of the case and I just personally don't see the problem with having an intelligent conversation with the client at the conclusion that says, "Does this hourly bill represent what's fair?" Or sometimes, clients say, "hey, it should be less," and sometimes they say "You were worth every penny of it and more," and why shouldn't we be

permitted to have that discussion? If a client says no, the answer is no.

JUSTICE KELLY: Great, thank you.

MR. BANK: Thank you. Any other questions?

JUSTICE KELLY: No.

MR. BANK: Thank you.

JUSTICE KELLY: Okay, our next speaker is John Allen with the Varnum Firm.

MR. ALLEN: Good morning Mr. Chief Justice, Madame Chief Justice, and Justices–

JUSTICE KELLY: Well that would just be acting, and with the indulgence which I'm really grateful and I think he's already sorry that he's done this.

CHIEF JUSTICE YOUNG: No.

[LAUGHTER]

MR. ALLEN: My opinion on this is that no amendment is needed. If an amendment is done, it certainly should not be Alternative A. That we have operated in this state from time immemorial permitting what amounts to results obtained fee, if that's what you want to call it, or permitting that as an element in -

CHIEF JUSTICE YOUNG: You don't concede ambiguity here?

MR. ALLEN: I'm sorry, what?

CHIEF JUSTICE YOUNG: You do not concede ambiguity here, in the current environment?

MR. ALLEN: I do not concede–

CHIEF JUSTICE YOUNG: That there is ambiguity in the way the rule is currently worded.

MR. ALLEN: Probably so, and I–

CHIEF JUSTICE YOUNG: So you'd rather live with the ambiguity than clarify it one way or the other?

MR. ALLEN: Indeed, and I think many speakers and lawyers –

CHIEF JUSTICE YOUNG: Most lawyers love ambiguity. That's how you make your money.

MR. ALLEN: And clearing up the ambiguity may be very helpful to us. When I started to practice law 43 years ago, my first package from the State Bar included a little black notebook and it told me what minimum fees to charge in various legal engagements, it also gave me a minimum hourly rate to charge. And a few years later, the U.S. Supreme Court, in *Goldfarm*, said you aren't allowed to do that. You aren't allowed to determine in advance what the terms of engagement should be between a lawyer and a client because it violates the Sherman Anti-Trust Act. And for those that think that's as old or should be forgotten, earlier this year the United States Supreme Court reminded us again and said that the state action immunity doctrine does not apply to regulatory bodies of professionals if they are inserting obstacles to practices or other violations of the Sherman Anti-Trust Act. That I'm the only letter-writer that's mentioned that, but I do think it's important. The function of AGC is not to determine what a reasonable fee is in advance. Nor, with all due respect, is that the function of this Court. That is a function for a client and a lawyer to determine by their contract, the analysis begins there, it should usually end there, except in very exceptional circumstances driven by strong public policy, supported by strong empirical evidence, none of which are present here. And that is why I do not think an amendment is necessary.

CHIEF JUSTICE YOUNG: Do you agree with the prior speaker that if at the end of the case, the lawyer proposes value-added or results obtained bonus, and the client says "no thank you," that's the end of the inquiry?

MR. ALLEN: That is the end, Your Honor. It's been my privilege to edit the ICLE Book on attorney fee agreements in Michigan for the past several years and I can tell you, although it doesn't rise to the level of Daubert admissible evidence, our consistent anecdotal evidence is that's exactly what happens. That the results obtained fee is proposed – much as it is, by the way, in commercial matters – for a contract, for a real estate transaction–

CHIEF JUSTICE YOUNG: If I have a construction contract and the builder completes the project, I rarely get a request to enhance his payment. I mean, that's an odd commercial exchange, isn't it? If you have a contract price and one of the parties says, "I want some more money," that's a little unusual.

MR. ALLEN: Respectfully, I would disagree. I believe that in many, particularly commercial transactions, be it real estate, merger and acquisition, certain bankruptcy claims, or real estate matters, it is not unusual at all for the lawyer to go back and say, "I think we deserve more given all the circumstances, do you agree?" If the client agrees, they pay, if they don't agree, they don't.

JUSTICE BERNSTEIN: Counsel, good morning, and I always appreciate when people come up here to share their views; I think this is such a good morning for the Court to have this engagement. Can I just ask you a question, because I'm trying just to understand how this would actually kind of work. The idea being is that if I were to retain you, would I know in the beginning that we're going to have this conversation at the end?

MR. ALLEN: My own personal experience and also my experience in dealing with other practitioners is yes, you would, it is usually written into an engagement letter or understanding to say, "at the end of the engagement, we may sit down with you again, talk about what the results are, and decide then if any additional fee is due or if the fee we have charged you is more than what the engagement is worth, in which case, the fee would be reduced."

JUSTICE BERNSTEIN: And just- Because I'm just trying to really kind of gather this. So I'm sitting down with you, I'm beginning a lengthy divorce, it's going to be a very intense process, and- How is it explained to me though, in such a way? Like, it's one of those situations where you say, "okay, at the end of this process we're going to have a discussion to discuss the outcome?" I mean, I guess what I'm trying to understand is give me a sense of exactly how that conversation takes place.

MR. ALLEN: Your Honor, I believe that it may be, and usually is very fact dependent on what occurred in the case, the level of understanding, and the sophistication of the client, the client's ability to pay – all those factors may weigh into it, and do. And if the client does not agree then there is no additional payment, it's just that easy.

JUSTICE BERNSTEIN: And then at the end though, let's fast-forward, that the case is now over and basically we're kind of wrapping it up, just try to help me understand a little bit about how this conversation would go. I'm just trying to look at it from a very pragmatic perspective; explain to me how we would engage in this conversation. I come into your office, the divorce is finalized, how do you bring up the results-oriented and value-added fees discussion with me? How do you- What would you explain it to me, how would you do this? Would the conversation go, "this is an optional fee?" How would you express it to the client so that they understand exactly that it's optional and what the ramifications of this are?

MR. ALLEN: My belief is that it is a standard practice that it would be explained in considerable detail both in person or by a verbal conversation and usually confirmed with some sort of writing about what the circumstances are that might justify the adjustment in the fee either up or down. And that the lawyer would not proceed that the lawyer was assured that the client did appreciate that, if the client does not appreciate it and understand it or if the fee is clearly excessive, even if the client indicates agreement, there are already remedies in the rules to take care of that. That is the jurisdiction of AGC, it would require a hearing, it would require some proof, but they have disciplinary authority over that right now.

JUSTICE KELLY: Thank you, Mr. Allen.

MR. ALLEN: No addition to the rule is necessary for that.

JUSTICE KELLY: Thank you, Mr. Allen. Again, just in light of the number of speakers we have, we're going to move on, and we're really honored to have our Attorney Grievance Commissioner, Mr. Gershel. Alan Gershel is here to speak on this issue as well.

MR. GERSHEL: Good morning. First of all, let me introduce myself. My name is Alan Gershel, I am the Attorney Grievance Commissioner and I am speaking here on behalf of the Attorney Grievance Commission. Thank you for giving me the opportunity to speak to the Court for a few moments this morning. I'll try and focus my comments on exclusively on the number of responses we have gotten to our proposal and hopefully answer any questions you may have. We take the position that whatever you call it, results-oriented, value-added, bonus-billing, it's simply not compatible with the rules of professional responsibility. It's not designed to protect the public. We acknowledge [inaudible

words] this position is not predicated because we got X-number of complaints. It is not a situation where it is data driven. We're not on a crusade as it concerns the family bar. This issue goes directly to the relationship between the attorney and the client; ethics are not driven by numbers. Attorney misconduct is a serious issue whether we get one complaint a year for example involving incivility towards the court or we get many, that's simply not a relevant consideration. One of the core requirements in the relationship is open and meaningful communication. This type of fee arrangement is simply inconsistent with that requirement. However well-intended the lawyer might be, explaining to a client that at the end of the process they'll be provided with a bill for an additional fee based upon some result is simply ill-conceived. What are the benchmarks, what are the criteria? The Court recently just asked Mr. Allen about that conversation. I was listening carefully as to what the client would be told. What are the benchmarks, what is required to earn that enhanced fee? I'm not sure we ever got an answer to that question.

CHIEF JUSTICE YOUNG: Does it matter if the client can say no, and that's the end of the inquiry?

MR. GERSHEL: I'm sorry, sir?

CHIEF JUSTICE YOUNG: Does it matter what the nature of that conversation is if after it's had, the client says no thank you?

MR. GERSHEL: If the client says no thank you, then it's not an issue.

CHIEF JUSTICE YOUNG: Then what is the ethical conundrum that you're worried about if the client always has the right, at the end of the presentation, whatever it is, to say, "I think I paid you enough."

MR. GERSHEL: Your Honor, with all due respect, I think we need to look at this situation in a very different way. We're talking about a situation here where the attorney is sitting down with a client. They are entering into a fiduciary relationship. We can't look at this issue as if it's a fundamental, basic contractual relationship. It's simply not a level playing field. How is the client to really understand, and I don't mean to be condescending here, the client at this point in time is probably going through one of the most difficult parts of their life, is sitting down with a lawyer, a lawyer they've chosen, and they're being asked to understand at the

completion of the case, I may, in fact, be asking you for additional money based upon these unknown and really non-specific factors. I don't think it's a fair relationship between the attorney and the client to negotiate that sort of situation.

JUSTICE MARKMAN: Mr. Gershel.

MR. GERSHEL: Justice Markman.

JUSTICE MARKMAN: The predominant response that we've received it seems to me is in favor of Proposal B, however among those people who favor Proposal A, it seems like a disproportionate number of them have used language either identical or similar to the concept of over-zealousness. The concern has to do with what they see as a proposal that may foster, incentivize over-zealousness. What does this mean to you? And is over-zealousness a good thing for a client? Not such a good thing for a client? Does it have consequences for the relationship of the attorney with the bench? What is your sense specifically as to this critique of over-zealousness being a possible outcome of Proposal B?

MR. GERSHEL: I think, Justice Markman, it's a legitimate concern. You're going into a situation where the lawyer knows if he or she achieves a certain result, they're entitled to more money. That's an inherent conflict. The motivation, despite how well-intended the lawyer might be, the motivation is going to be to be as aggressive as possible. And I think also that position is somewhat inconsistent with what this Court has said in the *Sands* decision.

JUSTICE MARKMAN: But isn't that what I want as a client? An overzealous attorney? One who is passionate, aggressive, committed to doing everything he can to facilitate an outcome that's favorable to me?

MR. GERSHEL: Sure, but you don't want to be looking at a situation at the end of the relationship and suddenly being told [sic], "because I've done such a good job for you, because I've really gotten you what you're really entitled to, I mean I'm required to effectively represent you, I'm entitled to some additional sum of money for a job well done." It's–

CHIEF JUSTICE YOUNG: Can I ask a question? Because there's an inconsistency here, it seems to me. This only applies to one class of client – those engaged in domestic relations. Is it

your position that every other client relationship is subject to value-added billing except this class?

MR. GERSHEL: I think the rules have been pretty clear that as it concerns value-added billing which, frankly, no matter how its wordsmithed is simply just another way of talking about contingent fees, and the rules specifically prohibit contingent fees in both domestic relation cases and criminal cases.

CHIEF JUSTICE YOUNG: I understand, okay. Criminal and domestic. But everyone else, every other client is potentially subject to value-added billing, is that correct?

MR. GERSHEL: As my understanding, yes, but-

CHIEF JUSTICE YOUNG: Okay, now. It seems to me that if that's the case then all the arguments about the secondary effects about empowering lawyers to be overzealous, etc., fall to the ground and the only justification for an inconsistent position here is the vulnerability of domestic relations cases and the inappropriateness of any kind of variation with criminal defendants, correct? Isn't that the only justification for a different rule in this context?

MR. GERSHEL: I'm not sure I follow the question, [inaudible words]

CHIEF JUSTICE YOUNG: Okay.

JUSTICE MARKMAN: Well with all respect to my colleague, I mean, I'm not sure all the arguments fall to the ground unless there's nothing that we can learn from the application of this kind of contingency fee in those areas in which it's already been applied. Are there some lessons that we should or should not learn or take away from those areas in which we've applied contingency fees? If there aren't, I think the Chief Justice is correct, that a number of your arguments tend to become less and less significant.

MR. GERSHEL: I think that we have to look at these types of cases – domestic relations cases – in a different lens than we look at any other kind of case. I think that the nature of the relationship, the situation the client finds him or herself in, the uncertainty of what the metrics are, I think put the client in a very disadvantageous position. I think they don't really- their only option really is to say at the beginning, "I don't want you to represent me." Because how do they negotiate this,

Justice Markman? How do they really know what this means? Isn't the lawyer doing exactly what the lawyer should be doing? Aggressive, zealous, prosecution of the case – this is what they should be doing. Why is there a basis for saying "here is a bonus for a job exceptionally well done, and by the way, I get to make that decision unilaterally and subjectively based upon my own determination of what I have done." That is not a system that is designed to protect the public.

JUSTICE MARKMAN: But let me put the question that I just impliedly asked you in the straightforward affirmative. What are the lessons that we've learned or not learned in terms of the application of this kind of fees system in those areas in which we've applied them in Michigan?

MR. GERSHEL: With all due respect, Your Honor, I cannot speak to what lessons have been learned or not, I just don't know the answer to that question. I can't respond to that.

JUSTICE MARKMAN: Wouldn't that be highly relevant in deciding whether to expand to this area?

MR. GERSHEL: I really don't think it is because again, for the strong public policy reason that drive the rule in this case and criminal cases, I don't think what may go on in [inaudible] construction cases and other cases whether value-added have any real relevance to what's happening in these sort of situations. You're talking about a case where two people sit down in a conference room, engage in arms-length conversation where there's no preexisting fiduciary relationship, where the terms can be explained and discussed – we don't have that sort of situation here, we just don't.

JUSTICE ZAHRA: Are you aware of situations outside of family law where there actually is a value-added, non-binding value-added fee agreement, as opposed to a pure contingency fee agreement?

MR. GERSHEL: I am not. I cannot answer that, I don't know the answer to that question, sir.

JUSTICE BERNSTEIN: Counsel, I have a question, just looking at this from a theoretical perspective in terms of kind of a contractual relationship. You know, ultimately, if – I know you're not going to concede this, but if you were going to concede the notion that you have a meeting of the minds, that you have a sophisticated client that comes in and basically

understands exactly what the attorney is expressing to them and saying to them. If you're looking at this from more of a free-market basis, in a situation like this, which is a civil matter, so in terms of this circumstance, you're contracting the attorney to do things that are legal and appropriate. Do people have the right to enter into contracts with an attorney to do the work that they ask and basically have the right to enter into a contract without government intervention? So long as the contract is legal, is appropriate, do I have the right as a client to sit down with an attorney and discuss with that attorney and then pay the attorney what I'd like to pay, and how much do I have a right, as an independent citizen, to enter into an independent contract with an attorney without government intervention?

MR. GERSHEL: I think the answer to that question is that presuppose we're talking about a very sophisticated client, and I don't think we can carve out a rule based out on the sophistication of a client. We're talking about as a general principle, what you've described, Justice Bernstein, is not the typical situation. We're not talking about a situation where a person can sit down and I can negotiate with you as my lawyer when you tell me that at the end of my representation, there will be an additional fee that may be charged based upon X-factors. I don't think that's specific, I don't think it's clear, I don't think it's understandable, and I think it's not in the best interest of the client.

JUSTICE KELLY: Thank you.

MR. GERSHEL: Thank you.

JUSTICE KELLY: Thank you. Okay, and next we'll hear from John Schaefer.

MR. SCHAEFER: Good morning Mr. Chief Justice, esteemed Justices. My name is John Schaefer. If I could take just a couple of minutes and

CHIEF JUSTICE YOUNG: That's all you've got

[LAUGHTER]

MR. SCHAEFER: I understand, and follow up on a question that Justice Bernstein asked. About 25 years ago, I represented the president of one of the auto industries, and in my course of my discussion with him, I said there are three components to my

fees. The first component is an engagement fee, or a retainer. The second component is an hourly rate. There are six lawyers in my office; we all have hourly rates ranging from 200 to 600 dollars an hour. That wasn't 25 years ago, incidentally, but that's today. The third component is a possible results-oriented fee which is entirely within the discretion of the client, and if the client says, "I don't want it," we'll shake hands and we'll go away friends. If the client says "you've earned every dime of it," fine. That's at – invariably, at the first meeting when the client says, "how do you get paid?" That was, I believe, Justice Bernstein's question, how do you deal with this? That's precisely how I explain it and have done it, and that same client though, 25 years ago, said "I understand what you're saying, but I would like you to put something in the contract or fee letter which says, 'in the event I have signed this letter, I understand that you may seek a results-oriented fee. But my signing of this engagement fee does not constitute my agreement to pay such a thing.'" That, to the best of my knowledge, has been in every one of our fee agreements since that time. So it says these are the three components, the last one is entirely in your discretion, and at the end of the day-

CHIEF JUSTICE YOUNG: Were it not, would it make any difference? Under this rule? In other words, if you hadn't this explicit disclaimer that my signing this is no agreement to the actual fee you want to charge me. Does the rule preclude the fee from going in effect without the client's consent?

MR. SCHAEFER: The old rule?

CHIEF JUSTICE YOUNG: The one that's being proposed that would explicitly permit the value added fees.

MR. SCHAEFER: I don't know, I don't know. But it shouldn't. I think the client must consent-

CHIEF JUSTICE YOUNG: You don't know. Well it makes a big difference to me whether the client's determination about whether to pay or not pay the value-added is controlling and whether the rule makes that clear.

MR. SCHAEFER: I feel strongly that this has to be an agreement between lawyer and client, which evolves-

CHIEF JUSTICE YOUNG: I'm not concerned about your private expression.

MR. SCHAEFER: I understand.

CHIEF JUSTICE YOUNG: I'm concerned about whether the rule is explicit enough so that whether you put that in your personal contract with the client, it's understood that ethically the client's declination is controlling.

MR. SCHAEFER: This may be outside of the scope of this morning.

CHIEF JUSTICE YOUNG: I assure you, it's not.

MR. SCHAEFER: Okay, then I submit that Proposal B is an adequate protection for the client and for the lawyer.

CHIEF JUSTICE YOUNG: Is inadequate? Or adequate?

MR. SCHAEFER: Adequate.

JUSTICE MARKMAN: Mr. Schaefer-

JUSTICE KELLY: So that's how fast three minutes can go, so

JUSTICE MARKMAN: Mr. Schaefer, I don't want to oversimplify, perhaps I'm doing that, but the inference I draw from the very, very strong support from the family bar for proposal B is that the bottom line, you can correct me if I'm wrong, but the bottom line is that more money will be going from clients as a class to attorneys as a class. If I'm correct in that inference, what is it that I tell the potential client class when I meet them around the state as to what, what's in it for them? Is there some kind of compensating advantage that the client class around the state derives from this in somehow neutralizing, or overcoming, or balancing what seems to me to be the likelihood that more money will be going to attorneys?

MR. SCHAEFER: I think it compensates for runaway hours. It compensates for the attorney that says "why should I ever want this to end? I'll charge my time all year long, I don't care what happens." - I hate to admit that this could happen, but – "I charge my time all year long, I don't care, notwithstanding the fact that the client said, 'my objective is to conclude this matter in the next three months. That's your charge, do the best you can.'" Well, if I'm charging by the hour, I sure as heck don't want to get it concluded in the next three months.

CHIEF JUSTICE YOUNG: That would be unethical, of course. Churning a file is unethical.

MR. SCHAEFER: Of course it is, and I didn't mean to submit that anybody would actually do that.

CHIEF JUSTICE YOUNG: I've never heard of churning.

MR. SCHAEFER: But I think there's an unconscious, and that's why the hourly fee is in such jeopardy, and why there's such a huge paradigm shift.

JUSTICE KELLY: But Mr. Schaefer, you've just identified one of the benchmarks that we were looking for. What would the value added or enhanced results be? So getting this done as quickly as possible, right? The client comes in and says, "I want this done in three months," right?

MR. SCHAEFER: That would be one.

JUSTICE KELLY: That would be one. So is that really a good result in a domestic case? Let's get it done in three months, well, maybe-

MR. SCHAEFER: I had a 67-year-old woman say to me the other day, "Please get this over with, I don't want to spend the next year and a half in litigation."

JUSTICE KELLY: But what if- what if there's three minor children involved and the court needs more than three months, but what if your great lawyer skills can get it three months, is that the best result in that particular case?

MR. SCHAEFER: I think that's fact specific, Your Honor. I think you have to assess that and you have to be honest and, as Justice Young just said, you've got to be ethical, relative to your professional responsibilities.

JUSTICE KELLY: Thank you.

JUSTICE MARKMAN: Will there be a transfer of wealth from one class to another class?

MR. SCHAEFER: I don't think so.

JUSTICE MARKMAN: You don't think- you think this is perfectly neutral in terms of the financial implications?

MR. SCHAEFER: I think it's certainly neutral in the- you're going to force this out of me. It's certainly going to be neutral in 90 percent of the cases.

CHIEF JUSTICE YOUNG: Let me ask, as the factual predicate here that has not been clear, this is going on now, isn't it?

MR. SCHAEFER: Yes.

CHIEF JUSTICE YOUNG: What climate- what will change if the rule explicitly permits this? Will it accelerate the use of these agreements or will it have no effect? Because that's really one of the questions. I believe this is happening in a case that came before us permitted that overturned the grievance that was lodged against the client [inaudible]. What is the state of the state now?

MR. SCHAEFER: Right, no, you're entirely correct. I think the only thing is to put it to bed. To put it to end, to say, "stop with all this, we don't want to come back here every couple of years and have this same argument." That's its only purpose, as far as I'm concerned.

CHIEF JUSTICE YOUNG: Okay.

MR. SCHAEFER: Thank you for your kind attention.

JUSTICE KELLY: Okay, and next we'll hear from Donald Campbell of Collins Einhorn.

CHIEF JUSTICE YOUNG: Oh not from Schaefer Firm?

JUSTICE KELLY: No that was Mr. Schaefer. Oh, yes-

CHIEF JUSTICE YOUNG: I know, they've had two bites so far.

JUSTICE KELLY: They only get two.

[LAUGHTER]

MR. CAMPBELL: Thank you. Good morning, Your Honors. A couple of things, drawing first on the point raised by the Chief Justice to Mr. Schaefer, if you look at proposal B, it does say at the very end "is agreed to by the attorney and the client." So that is specifically provided in Proposal B. Proposal A, I actually read to allow contingency fees, which I don't think was

the intent of the drafters. When you look at it, it ends with the line that "where the client is unable discern the basis in the rate, the fee is not proper." But if the client is able to discern, does that mean you can charge a contingency or some of these other factors or types of fees? And so if the goal of the Court is to erase ambiguity, Proposal A is a terrible rule. I represent lawyers who are usually charged, or at least investigated in terms of grievances, so in some respects, I'd love a Proposal A, but honestly, as you know, I have proposed a third option which is to clear up the ambiguity – and I'm going to use that in air quotes – on the current rules by simply putting it into the comment, which is where any ambiguities ought to be clarified.

CHIEF JUSTICE YOUNG: No.

MR. CAMPBELL: Well-

CHIEF JUSTICE YOUNG: Please, so you want-

MR. CAMPBELL: I accept that, I misstated that.

CHIEF JUSTICE YOUNG: So you want the clarification in a comment and not the rule? What kind of law is that?

JUSTICE ZAHRA: You were doing so well until that point.

[LAUGHTER]

MR. CAMPBELL: I understand, but it was air quotes for ambiguity, it's not real ambiguity, Your Honor. Again, the context here is not that Mr. Fryhoff did anything wrong, it's that he refused to change his fee agreement in the future. The only ambiguity is invented by the Grievance Commission. This is a practice that is not new to Mr. Fryhoff. It has gone on for decades. It has never been challenged by the Attorney Grievance Commission. You've never had a complainant who has come back and said, "I paid a value-added fee that I didn't intend to pay." It's entirely made up by the Grievance Commission. Where do you correct that? Could be an order from this court, could be a direction, the best place is to put it into the comment which instructs the Attorney Grievance Commission, and more importantly-

CHIEF JUSTICE YOUNG: You're just brushing my fur backwards.

MR. CAMPBELL: More importantly, it gives protection to the practitioners that are engaged in this proper activity, and that's the most important aspect.

CHIEF JUSTICE YOUNG: For the comments control over the rule?

MR. CAMPBELL: The rule controls, but this Court, as I pointed out in my letter, did adopt a comment only change to Rule 3.1 in 2010, so drawing on this Court's prior approach, I thought it was appropriate here.

JUSTICE ZAHRA: Is it fair to say that what people have described as this value added topic in a fee agreement is essentially a lawyer tip jar?

[LAUGHTER]

MR. CAMPBELL: I don't think that's fair at all.

JUSTICE ZAHRA: Why not?

MR. CAMPBELL: Well, and again, what we've heard from the practitioners – Mr. Bank, Mr. Schaefer, Mr. Gold is here, I don't know if he'll speak as well – but to the practitioners who have used this successfully without complaints from their clients over the not just years, but decades, what we've learned is this is an agreement that is reached with the clients and that the clients have to approve.

JUSTICE ZAHRA: But an agreement to agree later, which, if I remember my classes in law school, is no agreement at all.

CHIEF JUSTICE YOUNG: It's a notice. A warning.

MR. CAMPBELL: It's certainly a notice within the contract beyond that, again, under 1.5(A), under 1-7, it is one of the factors to be taken into consideration. It merely is advising the clients. I stood here about eight years ago in the *Cooper* case and there was all sorts of stories from the Grievance Commission about how the world was going to fall and the sky was going to fall if you allowed fees that describe the fee as nonrefundable by lawyers. We haven't had a single follow-up to the *Cooper* case since that time in terms of any abuse by the Bar.

JUSTICE BERNSTEIN: Counsel, I have a question. Do these conversations ever come up in the middle of the case? Like as you're progressing, do you ever have these conversation in the middle or is it exclusively just at the end?

MR. CAMPBELL: Exclusively at the end.

JUSTICE BERNSTEIN: At the end. But there's no- Is there any kind of time during the representation where this is ever kind of alluded to where the client would feel kind of, a little anxious about it, thinking "oh my goodness, here I am in the middle of this case, we're kind of moving forward." I mean, is there ever a circumstance or a situation that would arise where a client could feel in a sense the vulnerability that, like, "Boy, you know, I better kind of give the necessary indications because we're halfway through, I don't want to get another attorney, I'm anxious about it, and I better kind of let him know that I'm going to do this at the end because I want to make sure the representation is at the level that I need it to be."

MR. CAMPBELL: Very important. Within Michigan, the rule is that contracts for fees are usually established at the beginning. They are always reviewable but for the provisions under 1.5(A) 1-7, and so to answer your question, while it may be reviewable, if you're going to change a contract as pointed out in Mr. Mogill's letter, under 1.8(A), you would have to actually go in and approach it with a new written agreement. The client would have to be told about the wisdom of independent counsel, they'd have to sign off on not having independent counsel, so in terms of that, I would say it's so unusual as to not be an issue.

JUSTICE KELLY: Thank you so much, Mr. Campbell. Okay, and so we have two more speakers on this point. We'll move to Ken Mogill now. And you're on deck, Mr. Gold. Thank you.

MR. MOGILL: Good morning, please the court. I'm Ken Mogill, I'm an ethics practitioner, for purposes of identification only, I'm the current chairperson of the State Bar Standing Committee on Professional Ethics and I've also been an adjunct professor at Wayne Law, where I've been teaching ethics for about a decade now. As far- And I've got no dog in this fight.

JUSTICE KELLY: But you know a lot about it.

MR. MOGILL: I hope I do. As far as I'm concerned, the results obtained fee is, in fact, a form of contingency. The

ethics committee in 2009 expressed the same view consistent with ethics authorities in a number of other states as well. And, a contingent fee, or a form or a portion of a fee that has a contingent element is historically prohibit in divorce cases and our opinion- my opinion, excuse me, I'm only speaking for myself, the historical policy considerations informing that prohibition are as valid today as they've ever been. Even-

CHIEF JUSTICE YOUNG: Protecting the-

MR. MOGILL: Yes?

CHIEF JUSTICE YOUNG: It's protecting the divorcing party because of their vulnerability?

MR. MOGILL: It's protecting the public, the vulnerability is an issue. I think, Justice Markman, your question about overzealous– you want a zealous attorney, you don't want an overzealous attorney. And if-

CHIEF JUSTICE YOUNG: Again, I'm trying to core in—. First of all, it seems to me whether bidden or not, this practice is ongoing. That in the context of domestic relations cases, attorneys are charging value added. Do you agree that that seems to be-

MR. MOGILL: It is my understanding that it's occurring even though we have, in an informal ethics opinion, said we believe it to be unethical.

CHIEF JUSTICE YOUNG: Alright. Now-

MR. MOGILL: I also believe that there are a lot of attorneys who wouldn't come close to choosing to do this because they agree that it's unethical.

CHIEF JUSTICE YOUNG: Okay. Now, that's for the justification. It seems to me since value added billing is perfectly legitimate in areas outside of criminal defendants and domestic relation cases, the only justification other than we don't want the horror that's being visited in these other areas to be visited here, Justice Markman's question, other than that concern, the only justification I can see for continuing, or making explicit a ban on these fees is that the characteristics of a domestic relations client are too vulnerable to visit on them what we permit in every other area of legal relations. Is that accurate?

MR. MOGILL: I would respectfully disagree, Mr. Chief Justice. And that is for several reasons. One, I think you're making- the question makes assumptions as to the nature of so called value added billing in other kinds of cases. And before the Court acts on either of these proposals based on assumption there, I think there's a good deal of examination that would be needed. Second-

CHIEF JUSTICE YOUNG: There are no limitations on value added billing outside of domestic relations and criminal cases.

MR. MOGILL: That's not- I would respectfully disagree. The whole notion of a value added fee as a-

CHIEF JUSTICE YOUNG: Tell me what they- tell me what- give me an example of-

MR. MOGILL: Okay. The notion of a value added or results obtained fee as a standalone is kind of a misnomer. It's merely one factor in the reasonableness determination that can occur before, during, or after representation in 1.5. It's not a standalone.

CHIEF JUSTICE YOUNG: I understand there's a reasonableness limitation on all fees. But I'm trying to understand what the difference is other than the vulnerability of the particular client.

MR. MOGILL: The nature of the case is different. As well as the vulnerability of the client. And again, I think it's very important to look at, contrast business litigation where you've got a lot more factors involved, the pie is not necessarily one pie and it's not necessarily is defined pie. Here, you've got a defined pie, you insert a contingency element and you're inviting overzealousness as opposed to zealousness. You also- The vulnerability is not an insignificant factor. Also, and this does hold true altogether, but it goes to Justice Bernstein's question about free market. This is not a business transaction between two business people. This is a conversation that is occurring after an attorney has taken on a fiduciary responsibility to the client, which limits the attorney's freedom that would exist if it were a mere business transaction. That's a significant difference as well, and again, it applies just not in divorce, but the whole notion here of being able to come in the back door and effectively raise the hourly rate is incompatible with the lawyer's obligation under the rules to

inform a client of the basis or rate of the fee at the outset of the representation and that means it's got to be something that's understandable and clear. I would have no problem if the family law practitioners who want to get more money, and I agree, Justice Markman, that this does result in a transfer toward attorneys. If they're transparent and clear so a client can say yes or no my hourly rate is really this as opposed to that. It's not transparent, it's not normal-

JUSTICE KELLY: May I just interrupt?

MR. MOGILL: Certainly, Justice Kelly.

JUSTICE KELLY: And I hesitate to do so because I know we're over time, but you're the first speaker that has talked to the, quote, nature of the case, end quote. Could you compare this to a criminal case as opposed to a business case? I see this as more aligned with a criminal case than a business case.

MR. MOGILL: I honestly haven't been thinking about that. The- I'm going to have to pass on that one, I apologize, because I just- I just haven't thought about- Obviously there's a long standing prohibition against contingent fees in criminal fees.

JUSTICE KELLY: Right, my point is that in a criminal case, a lawyer is ethically bound and a great result would be, if I'm a criminal defense lawyer, I could pitch a new client by my persuasive powers bound by the rules of ethics I can sell your case to a jury. Now, to a high-asset criminal- to a high-asset divorce client, I could pitch a client I can get your case done in three months. And I see parallels that concern me under the ethics rules.

MR. MOGILL: I would agree with that. Another problem-

JUSTICE KELLY: Again, we're over time-

MR. MOGILL: May I make one last quick comment?

JUSTICE KELLY: One quick concluding comment.

MR. MOGILL: Another complicating factor here is that in some of these cases here the lawyer is controlling the assets they want to get an extra part of at the time that conversation occurs, which further skews the already un-level playing field. Thank you very much.

JUSTICE BERNSTEIN: Actually, I just have a question. I know we're over time, but I just want to go to a comment that you made that was very interesting. How would you distinguish between being zealous and overzealous in terms of, you know, in this situation? If you could just elaborate on that.

MR. MOGILL: Well I think that it goes to perhaps Mr. Schaefer's comment about time and Chief Justice Young's response: Wait a minute, churning is unethical. I think if you spend the time you've got to spend, that's all a red herring- you spend the time you've got to spend, if you go beyond that, you're churning. That's overzealous, it's unethical, it's really kind of a red herring because it's already unethical.

JUSTICE BERNSTEIN: And just one- my last question. The issue of the free market that, you know, I'm really trying to get a little bit more of a clear understanding of it, because I'm just trying to balance the public policy with the free market issues and concerns. If you could just address this issue as it pertains to at what point does an individual have the right to enter into a contract with an attorney, and how do you balance the right of the individual who, let's say, wants to enter into this contract and this relationship by getting the quote-unquote best attorney they can find, and willing to pay for it, versus the concerns of the bar association and the overall public policy issues that we have to face today.

MR. MOGILL: Thank you for that question. I think conceptually, the way- the best way to look at is that the rules of professional conduct set limits on what is otherwise a large degree of freedom in contract. The limits have been imposed by this Court in order to protect the public which is a primary responsibility of our profession and it takes into account, again, the fact that these are not- we're not selling, you know, widgets in a business. We take on fiduciary responsibilities to our clients that limit the freedom a non-lawyer has to contract and it goes- the bottom line, it's protecting the public. If the Court is going to consider Proposal B after hearing a lot from lawyers who want to have an opportunity to get more money, I think it would also be wise to make sure that before you make a decision, we hear from clients as well, because I tend to think that the perspective you would get would be valuable. I also tend to think that if this Proposal B was really going to protect the public, the line-up of support here would be very different from the narrow band of support from family lawyers without any other noticeable segment of the bar or the public.

JUSTICE KELLY: Thank You.

MR. MOGILL: Thank you very much.

JUSTICE KELLY: Thank you. Mr. Gold.

MR. GOLD: Good morning.

JUSTICE KELLY: Good morning.

MR. GOLD: Mr. Chief Justice, Acting Madame Chief Justice, and members of the Court. My name is Edward Gold, I've had the pleasure of being a member of the State Bar of Michigan for over 50 years during which I have practiced family law. I speak about this rule because I think what it does is that it attacks the integrity and honesty of the family law bar. The family law bar is being singled out and I think one of the questions was what about these other areas of law? Having had the pleasure of practicing in a large firm where they practiced all kinds of law, not just family law, and I guess that made me a bit unique in the family bar, I found that these kinds of discussions take place all the time. In today's fee-sensitive world we live in, corporations are looking for ways to save money on their legal fees. Now, you would say, "why would you say that when the discussion here has been how to make more money for lawyers?" Because the corporations want some bang for their buck. They come in and they say, "I can hire anybody on this street." And I heard Mr. Gershel say why should you lawyers get paid for what you get for your client that they deserve? That isn't the issue here. Value-added, enhanced fees, whatever you chose to call them, get paid where lawyers do an extraordinary job for their client. They perform above and beyond the call of duty with respect to the results, and no one's- everyone's sort of been dancing around your questions here. What is a result that a client might pay you more for? How about the woman who comes in and says I've been talking about divorce with my husband for two years, he tells me his company's worth $180 – it doesn't matter what the number is – and I think he's probably right. And we have this discussion that you've all been talking about. When do you have it, when do you- And I say, "Well, I don't know what it's worth, but I'm going to find out what it's worth." And I find out it's worth $500, and instead of her getting half of $180, she gets half of $500, and I end up getting an extra X, and she ends up getting a pot about that big, of which I took a slice about that big, for getting her a lot more than anyone expected, and I got it because my experience, my knowledge, my effort, my knowing who the right expert was to hire, my knowing

how to cross-examine the other expert, experience I've gained over years and years of practice. And what is being proposed here is to say that because we do that, we shouldn't get anything extra, and only get it when the client agrees to give it to us. Which is even more limiting on our ability to get it. So, it seems to me what is being proposed here is simply discriminatory. I know for a fact, bankruptcy lawyers, real-estate lawyers, business lawyers- and some say, "Well, divorce clients are more vulnerable." How about the small business owner that's having his business taken away? Isn't he vulnerable? Isn't he now going to lose his livelihood when he goes to a lawyer and the lawyer says, "At the end of our case, I want to have a discussion with you. If you don't agree I'm worth more, then I just won't get it. But if you do agree that I've saved your business, that your family now has the ability to continue to support itself, I'll give you a number. If you say no, then it's going to be no." Often times, though, the client says-

JUSTICE ZAHRA: Is that, in fact though, what's happening in these other areas of bankruptcy-

MR GOLD: Excuse me?

JUSTICE ZAHRA: Is this in fact what's happening in these other areas that you've described? Is it, in fact, the value added agreement that is the subject of this hearing or is it a pure contingent fee agreement?

MR GOLD: Well it's interesting-

JUSTICE ZAHRA: Because it's not barred in those areas.

MR. GOLD: I'm sorry to have interrupted you, Justice.

JUSTICE ZAHRA: No.

MR. GOLD: As far as I can gather, from the folks I've spoken with, we do it more legitimately than they do it. They don't even have the worlds "value added" in their agreement, but at the end of the case, they sit down with their client on a voluntary basis and they say, "This is what I just did for you. And it seems to me a fair fee would be X." At least the family law lawyers have the discussion in front many times and put it in writing so there's an agreement.

JUSTICE ZAHRA: So it's not a contingent-

MR. GOLD: But I have spoken to bankruptcy lawyers who have- I'm sorry.

JUSTICE ZAHRA: But it's not a contingent fee, it is-

MR. GOLD: Absolutely not a contingent fee, and I don't know a divorce lawyer in my 50 years that's ever charged a contingent fee.

JUSTICE ZAHRA: That wasn't my question.

MR. GOLD: No, but I think it is being done, and it is being done, and I see it more now in general litigation cases than I've ever seen it before.

JUSTICE KELLY: Well thank you, Mr. Gold.

MR. GOLD: Thank you.

JUSTICE KELLY: Appreciate it. I think this is a good point to end this discussion on. And again, we really appreciate the comments and appreciate this robust discussion. This has really been a good public hearing on this issue for us. So thank you.

MR. GOLD: [inaudible words] In my 50 years I've practiced before every court in the state except the Supreme Court, so I'm delighted to have had this opportunity to be here.

JUSTICE ZAHRA: Now that's value added.

[LAUGHTER]

CHIEF JUSTICE YOUNG: Now you can add that to the list.

That's value added, thank you.

ITEM NO. 5 (2014-09; MCR 7.215)

JUSTICE KELLY: It was great to have you, Mr. Gold. Okay, there are no speakers on item number four, so we move to item number five, we have many speakers, again, on this topic. I will try and- I'll try and stick to the three minutes maybe a little bit more steadfastly. So, item number five is whether to adopt the proposed amendment of MCR 7.215 that would revise the circumstances under which a Court of Appeals opinion is to be published and would disfavor citation of unpublished opinions in the Court of Appeals. We have many distinguished speakers. We

have likewise on this issue received many, many comments from not just the speakers that are present today, but from many others as well. So first we will hear from S. Joy Gains, I assume you go by Joy Gains, I don't know you, I'm sorry, who is a public defender with the Washtenaw Public Defender's Office. Is Ms. Gains present? Everyone's looking around as though she's not.

CHIEF JUSTICE YOUNG: Item five-

JUSTICE KELLY: Oh, I don't have a revised list, I'm sorry. Judge Gleicher. I know she's present, yes. My apologies. We had comments from your colleague. We had comments from Miss Gains, but she's not an endorsed speaker for today, my apologies, everyone.

JUDGE GLEICHER: Good morning.

JUSTICE KELLY: Good morning to you.

JUDGE GLEICHER: I want to start by taking a moment to remind us how we got here. We were invited by the Chief Justice to revisit 7.215-

CHIEF JUSTICE YOUNG: Oh, so it's my fault now?

[LAUGHTER]

JUDGE GLEICHER: Actually I thank you, we thank you for it. If you had allowed me to continue for a second, I would have said, and I mean to say, that we're most grateful for the opportunity that you provided us because the rule did in fact need amendment. The concern that was expressed by the Chief Justice is that we were not adequately following the rule as it stood and, thereby not publishing enough opinions that were worthy of publication. We have amended subsections 2, 3, 5, and 7 – 4, 5, and 7 of the rule, and I don't think there's any opposition to those amendments. Those amendments are designed to help our judges cast a wider net over the cases that we decide and hopefully publish a larger number of cases that are in fact publication worthy.

JUSTICE MARKMAN: I think- If I might just interrupt for a second, I think Mr. Baughman indicates that they do just the opposite.

JUDGE GLEICHER: Well, I respectfully disagree with Mr. Baughman.

JUSTICE MARKMAN: You had indicated that there was no disagreement on that, I think there may be considerable disagreement.

JUDGE GLEICHER: Then he is one of the few who has disagreed. I didn't understand him to be disagreeing specifically with that as opposed to subsection C. I-

JUSTICE MARKMAN: He disagrees on that as well, but he also thinks that you're going to end up publishing even less than you do right now.

JUDGE GLEICHER: Well, I- Judge Murray will speak to that issue more directly. I think that Mr. Baughman is incorrect, and I think that the judgement of the Court of Appeals and particularly of the rules committee is that the amendments, in fact, widen the net rather than narrow it. The portion of the rule about which there is great controversy is subsection C, and that controversy, of course, revolves around the citation of- to unpublished authority. In our view, the amendment that we propose merely summarizes that which effective advocates in our court, and yours, already know. Citation to unpublished authority without explanation as to why is ineffective. It does not advance a client's cause and, most importantly, it does not help the court to decide a case or craft an opinion. It is, in fact, counterproductive. It sends a message to our judges that the advocate has not done his or her homework because the advocate has not located published authority, binding authority, that would, in fact, be helpful to the court.

JUSTICE KELLY: Is that overstatement, though? In cases in all areas? I mean, you can see that there are areas where there's less published authority.

JUDGE GLEICHER: Absolutely, and we- and the rule anticipates such cases and we invite, in those circumstances, practitioners to tell us precisely that fact in a phrase, a sentence, a short footnote, bring our attention to that reality and we will of course, at that point, read the unpublished authority that you have presented to us. There is no aspect of this rule that ties a practitioner's hands behind his or her back or forecloses a practitioner from citing unpublished authority. To the contrary, the rule invites the citation of unpublished authority if the practitioner can justify such

citation. I would close by saying this: In proposing this rule, the Court of Appeals places the- places Michigan well within the mainstream of other Courts of Appeal and other Supreme Courts in this country. The Appellate Section of the State Bar presented to us, at a meeting- a joint meeting that we had with them, a summary of the rules of practice in all fifty states on this particular subject. We had already done precisely the same homework in the Court of Appeals, so we had basically the same cheat-sheet, if you will, on what occurs in other Courts of Appeal, I will tell the Court-

JUSTICE MARKMAN: Can you share that with this Court?

JUDGE GLEICHER: Of course.

JUSTICE MARKMAN: Because that's not-

JUDGE GLEICHER: Ours or theirs? We can- I can mail you both. Ours and theirs.

JUSTICE MARKMAN: I must say, I don't mean to sound pretentious, but that's not entirely consistent with information that we have either.

JUDGE GLEICHER: Okay, well I can tell the Court that some states forbid any citation to unpublished authority. I'll give you a brief list here, and it's not complete, but I think it's meaningful. Any citation, any citation. No exceptions. So, they do not go as far as we have proposed going. Washington-

JUSTICE KELLY: It might be better if you provide us-

JUDGE GLEICHER: Okay. There are a number of states that do. Others allow for a safety valve, like ours, and we think that that is the preferable rule here. In closing, we are- we propose this rule to help lawyers be more effective practitioners in our court because it is in fact published authority that helps us to write the best, most coherent, most effective, and most- opinions that abide by the rule of the law, and that's our goal.

JUSTICE MCCORMACK: Judge Gleicher, I have one question. If we were to agree with you, do you think either you or any of us need a personal protection order from Judge Cohn?

[LAUGHTER]

CHIEF JUSTICE YOUNG: We all need a personal protection order from Judge Cone. I already have one.

JUSTICE MCCORMACK: I'm just wondering.

JUSTICE KELLY: Judge Cone provided comments to the court.

CHIEF JUSTICE YOUNG: Tell him I already have one.

JUDGE GLEICHER: I had lunch with him on this subject and we've reached an accommodation, he and I, so. At least I won't, maybe you do.

[LAUGHTER]

JUSTIC KELLY: Okay, and Frederick Baker is next.

MR. BAKER: Chief Justice Young, Acting Chief Justice Kelly – good luck to you in practice, and Justices. It is the office of a per curiam opinion to apply subtle law to new facts. The current rule provides that if a per curiam opinion is unpublished, and that's all we're talking about – nobody cites a memo opinion. If a per curiam is unpublished, it is not precedentially binding under the rule of stare decisis. And I want to stress those two words: stare decisis. But it is citeable under the current rule for whatever persuasive value it may have, if counsel provides a copy to court and counsel. I'm probably committing a form of suicide by speaking in opposition to a position that's been articulated by Judge Gleicher, but I really have to take issue with some of the things she said. Practically, all PC's are published in this day in age because they are all available online. The proposed amendment can only operate to deprive the Court of Appeals, litigants, and counsel of the benefit of the court's own prior decision.

CHIEF JUSTICE YOUNG: How so? They're published-

MR. BAKER: Because-

CHIEF JUSTICE YOUNG: Just a moment.

MR. BAKER: Because it impose-

CHIEF JUSTICE YOUNG: Excuse me.

MR. BAKER: Excuse me.

CHIEF JUSTICE YOUNG: I'll finish my question before you answer it. If the burden is merely, as articulated in the rule, to explain why this particular unpublished opinion is relevant to the case, why is that an insurmountable burden on the advocate?

MR. BAKER: Well, for two reasons. And I would point out first of all that no appellate attorney would cite an unpublished opinion and rely upon it if there were published authority available?

CHIEF JUSTICE YOUNG: Oh really? You used to be a commissioner, you know that to be untrue.

MR. BAKER: Well, I know that what you want is binding precedent if you can find it.

CHIEF JUSTICE YOUNG: Sometime that binding precedent is contrary to your position.

MR. BAKER: I couldn't hear.

CHIEF JUSTICE YOUNG: Continue.

MR. BAKER: But what this proposed rule does is to inject two things into the process of appellate advocacy. First it requires a determination or a demonstration that the unpublished opinion directly relates, whatever that means, to the case at hand. Which is an imprecise standard, others have spoken to this, and I would simply observe that lawyers reason by analogy and analogy or analogic reasoning is, by hypothesis, not direct authority, it's analogy, it's similarity. The other aspect of it- and that's inconsistent with the way lawyers think if you require it be directly related. It's inconsistent with the way most of our arguments are formulated. Secondly, it injects a new issue, we're going to be- may I continue?

JUSTICE KELLY: You can finish your sentence.

MR. BAKER: Okay. It injects a new issue into the case, it requires a demonstration by the attorney and an argument about whether the case directly relates or not. I have other comments, but thank you for your time.

JUSTIC KELLY: Thank you, Mr. Baker.

MR. BAKER: And good luck.

CHIEF JUSTICE YOUNG: Thank you, I appreciate that. Okay, and Judge Murray from the Court of Appeals is our next speaker.

JUDGE MURRAY: Good morning.

JUSTICE KELLY: Good morning.

JUDGE MURRAY: Thank you for having me here.

JUSTICE KELLY: Thank you for being here.

JUDGE MURRAY: I have sent a letter-

CHIEF JUSTICE YOUNG: We couldn't preclude you.

JUDGE MURRAY: I'm sorry?

CHIEF JUSTICE YOUNG: We couldn't exclude you.

JUDGE MURRAY: No, I know.

JUSTICE MCCORMACK: We talked about it.

[LAUGHTER]

JUSTICE KELLY: But we're happy that you're here.

JUDGE MURRAY: It's still nice. A little awkward, but it's still nice. But I did submit a written- a written letter, outlining the reasons why I think this rule, again focusing on the unpublished aspect, should be adopted. And the only thing I really wanted to say today other than answer any questions that you may have is I think there, you know, because of the outcry from the attorneys on this one rule has been tremendous, and I think there's a disconnect between what we see on a day-to-day basis and what a lot of the lawyers who have submitted responses see. Mr. Baker indicated no attorney would ever cite an unpublished case when there was a published case available. I submitted three recent examples that came across my desk where the unpublished opinion for summary disposition, for a general principle of law in probate, and one other general principle, and it happens all the time, and it's unacceptable. We're not forbidding under this rule the citation of unpublished opinions when it's appropriate. Even the Appellate Practice Section says their lawyers, the good lawyers, already do that. So why wouldn't we expect everyone else to do that?

CHIEF JUSTICE YOUNG: Could I ask the question? I mean, I don't see any particular burden to explain why this opinion is relevant and I don't think it's an incoherency to say, "explain particularly why," but it does place unpublished Court of Appeals, Michigan Court of Appeals position in a less advantageous than a comparable opinion from another state, does it not? I mean, if the Court of Appeals from Indiana has something to say on a particular subject and we have an unpublished Michigan Court of Appeals opinion on the subject, doesn't this rule place the Michigan unpublished opinion at a slightly disadvantaged position, in that you don't have to justify use of a foreign jurisdiction's nonbinding opinion?

JUDGE MURRAY: I don't think so, only because I think in practice, in practical ways, usually if they do cite a published, foreign jurisdiction decision, they explain why they're doing it because I know normally in Michigan we don't look to the outside jurisdictions. So there usually is some type of explanation. But to the extent there's not, you know, I think it would be a valid different treatment because our court rule says they have no precedential effect, whereas if Indiana publishes a decision that presumably they think that's worthy of publication and should be authority out there for whoever wants to consider it, our unpublished opinions aren't there for that reason.

CHIEF JUSTICE YOUNG: Could you speak to Mr. Baughman's argument that rather than clarifying, you're actually shrinking the range of decisions that are- should be published?

JUDGE MURRAY: Yes. And I don't blame him for thinking that.

CHIEF JUSTICE YOUNG: Okay.

JUDGE MURRAY: Well, because, again, this is a practical thing. I think under the current court rule, virtually every opinion that comes out of our court should be published. Because it says to any case that involves a new set of facts. Well, every case involves a new set of facts. So we thought let's make this a more practical rule for when an opinion should be published. And, so, although it does look like it's narrowing, I think people will look, including myself, will look to the rule much more often as to determine whether it should be published or not. And I think that will be- the impact of that will be more published opinions, even though I don't necessarily think

that we need to publish more, I think it's been consistent over the last decade how many we've published, but-

JUSTICE MARKMAN: Judge Murray, I certainly agree with you on at least one point that you've stated and that is that there seems to be a disconnect between the bench and the bar on this issue, a very considerable disconnect. And, perhaps I'm reading something differently into your statement than you intend, but this phenomenon of allegedly citing unpublished opinions when there's adequate published opinions that could be cited seems to be a function, if I'm understanding you and Judge Gleicher, that the bar is insufficiently diligent in trying to identify published cases where they exist, and/or they're insufficiently analytical in failing to recognize better published opinions than the unpublished opinions they cite. Is this really true of the great bulk of the bar that seems to be disconnected from the bench on this or is that simply a phenomenon that you can find in an isolated or discreet case here and there?

JUDGE MURRAY: No, but it's not the great bulk either.

JUSTICE MARKMAN: And maybe they simply disagree with you in terms of the cases that you feel they should have cited instead of the ones they did cite, is that possible as well?

JUDGE MURRAY: No, it's not, because the examples I gave were for principles that they're- I mean, summary disposition standard, statutory construction principles. I mean, it's so bad sometimes. And the word I used, disconnect, didn't mean in the ability to properly advocate. The disconnect is, most of the lawyers who submitted responses and criticisms are from very good firms or good practices where they know how to practice law correctly. The disconnect is they don't see what we see. But it's not the great bulk of lawyers, of course it's not. The great bulk of lawyers do it the proper way. But it's undisputed that, and this gets more and more each year, where we do get these unpublished opinions that shouldn't be used for these basic reasons, and we get, you know, sometimes we'll literally get 20 unpublished opinions handed to us in a family law case because each one deals with a separate issue under the child custody act.

JUSTICE MARKMAN: And when this occurs, the burden on the court is exactly what?

JUDGE MURRAY: Well, typically I try to read whatever people think- they tell me is relevant, and it adds a lot of extra work and then when you get to reading it, you realize-

JUSTICE MARKMAN: Well why- I don't mean to- Let me just slow you down for a second because I need to follow what you're saying. Why is extra work to read what I would tend to think on balance would be a typically shorter unpublished opinion than a published opinion?

JUDGE MURRAY: Well I- I'm not sure that's typically the case. I think our unpublished opinions have become very lengthy. They're much lengthier than they were 15 years ago, and it's added work to go through 15 or 20 unpublished opinions-

JUSTICE MARKMAN: I don't understand why. Why is it harder to go through an unpublished opinion than a published opinion?

JUDGE MURRAY: It's not harder to go through-

JUSTICE ZAHRA: Is it because the unpublished opinions don't have the same time put into them with the statement of the issue upfront, the answering of the question upfront, it's more concise? I mean, my recollection of unpublished opinions is you throw in a lot more facts and it's more like a letter to a client than it is a legal disposition on a rule of law.

JUDGE MURRAY: That's absolutely correct.

JUSTICE KELLY: Again, I'm mindful of the time, but this is an important issue so I'm going to ask this question anyway and, indulge my colleagues, they only have a couple weeks of me left anyway. So the question is this: Is there any analysis on the Court of Appeals as to the areas in which all of these unpublished opinions occur and whether there needs to be more published opinions in these areas, such as family law?

JUDGE MURRAY: No, there has not been an analysis. I think you're probably right, there's probably slightly more in family law context, but we get a lot on sentencing issues, OVs, things like that.

CHIEF JUSTICE YOUNG: Most of those are settle areas of the law. Those are-

JUDGE MURRAY: Yes.

CHIEF JUSTICE YOUNG: The family area there may be actually more unsettled areas, but the whole function of an unpublished opinion, if the Court of Appeals judges are following the rule, is that it is as Justice Zahra was suggesting, a letter to the combatants in saying you won, and you lost, and here's some reasons why, and it is not an elaboration on the law because there is none needed. It is a settled area of the law.

JUSTICE KELLY: My point is that has there been analysis by the Court of Appeals as to, there are certain substantive areas of the law that we have not published enough opinions in these particular areas.

JUDGE MURRAY: No there have not- there has not. And I do- To your point, and I'll step down, is that's the other thing people don't remember is that probably 90-95 percent of the cases each month are on settled areas of the law, and that's why, you know, people complain about fewer unpublished [sic: published] opinions, but most of our cases just really don't require it.

JUSTICE VIVIANO: Judge Murray, I have one quick question. The rule as proposed obviously only impacts appeals, at least directly. Do you think that this will impact the citation of unpublished authority in the trial court?

JUDGE MURRAY: That's a good question. I think the way the rule is written as proposed, it would not, because it talks about issues on appeal, but-

JUSTICE VIVIANO: Should it, or should it not impact the trial courts?

JUDGE MURRAY: It was intended to impact only our court.

JUSTICE MARKMAN: Judge Murray, I've seen the citation of unpublished opinions too, and I agree with what Judge Zahra and the Chief Justice have said – that there are many unpublished opinions that are supposedly letters to the parties. But there are many unpublished opinions that are as good as published opinions and as Mr. Baker indicated a few minutes ago, there's very little citation to memorandum opinions, precisely because memorandum opinions are truly letters to the parties. I wonder whether it is true that the unpublished opinions that are cited are truly of the letter to the parties-type, as opposed to those unpublished opinions that could just as easily have been published by the court if it had chosen to do so. I don't know

why a good attorney or a conscientious attorney would possibly- would conceivably cite a memorandum opinion or a letter to the party unpublished opinion when there were better unpublished opinions, much less published opinions, that were available. So I think to kind of characterize or maybe even stereotype unpublished opinions as not really being statements of the law and not really any having renditions of fact and not supplying any kinds of contextual opinions, in my experience, really overgeneralizes in a negative way what an unpublished opinion is all about. Does that make any sense to you or do you disagree with that?

JUDGE MURRAY: I do both. I think you're right-

CHIEF JUSTICE YOUNG: Isn't your point that the idealized lawyer that Justice Markman is talking about doesn't show up as uniformly in the Court of Appeals as we'd like?

JUDGE MURRAY: That is a true statement, as well. But I agree that our opinions do- Like I said before, they're longer than they used to be. In fact, I don't think we do memorandum opinions anymore as a policy. I think we decided that. But it still stands that there's a reason they're unpublished, and there's a rule that says they don't have any precedential effect, and people are ignoring that. And all we're trying to do is to get people to understand there's a difference and if you want to use it, that's fine, but tell us why. And that's it.

JUSTICE KELLY: Thank you.

JUDGE MURRAY: Alright, thank you very much for your time.

JUSTICE KELLY: Thank you. Okay, and next we have Timothy Diemer. Mr. Diemer, I'm going to let you make your appearance because you're speaking both on your own behalf and on behalf of the Negligence Section, as I understand it.

MR. DIEMER: Good morning, Your Honors. That was lack of clarity on my part, I'm here on behalf of the Negligence Section, only-

JUSTICE KELLY: Oh, excuse me.

MR. DIEMER: Not on my own behalf.

JUSTICE KELLY: Okay.

MR. DIEMER: I appreciate the opportunity. We take no position on the proposals to amend subsections A and B, although it was interesting to hear some of the back story that there's concern about a lack of published authorities because that's been my experience as an appellate attorney, and my research showed roughly 8% of opinions of the Court of Appeals the last five years are unpublished- I'm sorry, are published. 8% are published. There's no information before 2010. And then, the federal circuit, it's about 20%, so we're less than half of what the federal circuits would publish. And in my experience, personally – sorry, I'm going to go on personally here now – there's oftentimes where there's a lack of published authority to guide my brief, guide my analysis, and there are reasons to cite unpublished opinion. Maybe to show that a published authority is applied consistently by the courts, by numerous panels, or to show they are applied inconsistently.

CHIEF JUSTICE YOUNG: Why wouldn't that be- the burden then, under this rule is simply to say that.

MR. DIEMER: That's correct.

CHIEF JUSTICE YOUNG: And as a good advocate, that would be the justification for bringing those to the court's attention. Why is that an onerous burden?

MR. DIEMER: I wouldn't say it's onerous, I wouldn't say its insurmountable-

CHIEF JUSTICE YOUNG: If there are people out in our profession who could benefit from a little more direction, why isn't that a good direction?

MR. DIEMER: Well, maybe this feeds into Justice Viviano's point, we think it would have not just an impact - and this escaped my attention the first time I read the proposal, to be honest with you, that it refers just to 'on appeal.' That- We think- I think this would have a chilling effect on the trial courts, I think the trial courts see that the Court of Appeals would say that if you're citing an unpublished opinion to us is unfavorable, then it would impact the trial court's opinions on unpublished opinions, as well. And I don't think- It's not insurmountable if there's a proposal to make the length of a brief down to 40 pages instead of 50, that wouldn't be insurmountable, but there still would be opposition to-

CHIEF JUSTICE YOUNG: I mean, why is it even- Why would a lawyer even quibble with a requirement that says you've got to explain why you're doing this?

MR. DIEMER: Well, I wouldn't- In my briefs, I would always do that. I will say here's-

CHIEF JUSTICE YOUNG: Well, okay. Just stop. You always do it. Why do you always do it?

MR. DIEMER: It's good advocacy.

CHIEF JUSTICE YOUNG: Then why in the world wouldn't we support something that supports a principle of good advocacy?

MR. DIEMER: My concern would be it's going to have a chilling effect in the trial courts.

CHIEF JUSTICE YOUNG: On you?

MR. DIEMER: Well, I think a trial judge is more likely to say if the Court of Appeals disfavors citations of unpublished opinions, I don't want you to send them to me either. I think-

JUSTICE MCCORMACK: Well, tell me- Just, because I don't- Maybe Justice Viviano will tell me later. Why would that be bad in the trial court? To play by the same rules. You could still present unpublished opinions, and I imagine there are some areas where that might be all you have in a trial court, but when that's all you have, then the trial judge looks at them and understands that that's all you have and they sort it out. Why is it a bad rule for the trial court?

MR. DIEMER: I would think that the rule should be applied equally. Appellate court, trial court. I don't think there should be a different, like, you can cite it to a trial court, but since you're on appeal it's- you're disfavored. I don't think that would be a good rule. But I've had two very recent experiences. One was construction of MCR 2.313, a very exciting issue where there was nothing from the Michigan Appellate Courts. Not a single published decision. I had six unpublished opinions, 18 judges of the Court of Appeals all agreed with my interpretation-

JUSTICE MCCORMACK: But my question is, so what? Do you think the trial courts might say, "Oh, there's no published

cases, can't decide" and like take a pass or will they then look at the unpublished opinions and figure it out?

MR. DIEMER: Well currently there are some judges in the trial courts will say unpublished opinions are fine, some will say don't cite them to me. I think if this rule were passed, I think you'd have more of "don't cite them to me," because they're disfavored in the Court of Appeals, so I don't want to hear about them either. I think that would be a practical effect which is what Justice Viviano's question was.

JUSTICE MARKMAN: Counsel, isn't it a little bit ironic that there would be a higher barrier to the citation of an unpublished opinion that presumably is unpublished precisely because it contains clearly settled law than the citation of a published opinion that doesn't have that starting premise?

MR. DIEMER: The idea that if it's unpublished it's so obvious to everybody we don't need to publish it

JUSTICE MARKMAN: Right.

MR. DIEMER: But that would be- I had not thought about that, but that would be-

JUSTICE MARKMAN: That's not an argument for non-citation of an unpublished opinion, it's just the con- it's exactly to the contrary, it's precisely because the members of the Court of Appeal have determined that the propositions of law that they are articulating are so well-settled that they're placing them in an unpublished opinion, and yet we're told, if the rule is successful, that that is a class of opinions that we should be taking extra care to cite as opposed to actually looking for opportunities to cite.

MR. DIEMER: That's a perfectly fair interpretation, and my view would be the more opinions, the more views, the more judges to weigh on an issue that you can, in your case, you can put in your brief, the better it's going to make for better law, better advocacy, and better development of law. I'm out- way over, well over my time, and if the Court has any more questions I'm happy to answer them.

JUSTIC KELLY: Thank you.

MR. DIEMER: Thank you very much for your time.

JUSTICE MARKMAN: We appreciate you. Mr. Ger- Let me say this right, Gerville-Reache. Is that close? Good.

[LAUGHTER]

CHIEF JUSTICE YOUNG: I'm so glad it's your day.

JUSTICE KELLY: Yes, I would have practiced had I thought of this more than ten seconds before.

MR. GERVILLE-REACHE: Good morning again, Chief Justice Young, Justices.

JUSTICE KELLY: Good morning.

CHIEF JUSTICE YOUNG: Pronounce it for us.

JUSTICE KELLY: Yes, say for me.

MR. GERVILLE-REACHE: It's Gay-ten. Ger-ville Ray-ash.

JUSTICE KELLY: It's beautiful, thank you.

MR. GERVILLE-REACHE: The problem is that the accent mark's probably not over the E in the last name, I'm sure you would have gotten it right if it had been there.

CHIEF JUSTICE YOUNG: I have it over mine.

JUSTICE KELLY: I have it- Yeah, I do have it over the E.

CHIEF JUSTICE YOUNG: It's the first name that's challenging.

MR. GERVILLE-REACHE: Yes. Well, true. I obviously want to keep this very short. Let me start with where we agree with the Court of Appeals. First of all, we agree to disagree with Mr. Baughman. I think that the revisions to A, or B, rather, are productive. Secondly, we concede that this is not blanket prohibition against citation to an unpublished opinion. We also will concede that there is a problem with the un- what I'll call the unproductive use of unpublished opinions in briefs. There's probably also a problem with the unproductive use of published opinions and law review articles and a number of other things. Where we disagree is that this problem, first of all, deserves a court rule. Secondly, that this rule will solve the problem, and third, that this rule only goes as far as they say it does. Now,

that latter conclusion I came to only recently when I read Judge Murray's comment, and I'll explain why I reached that. But first, why this problem doesn't deserve a court rule, and it's been alluded to already. You know, while it's certainly baffling that counsel would cite an unpublished opinion when it's just easy to look at the unpublished opinion and find the published authority that it is citing, and cite that instead, it's equally not that difficult to- for the court to look at the unpublished opinion, research staff to find in the unpublished opinion the published authority that is relied upon by the unpublished opinion. So we don't think that this really deserves a court rule. Some guidance to appellate practitioners would be helpful as-

CHIEF JUSTICE YOUNG: Why isn't this guidance?

MR. GERVILLE-REACHE: -the appellate practice handbook for-

CHIEF JUSTICE YOUNG: Why isn't it guided? It's in the rule. Explain why you're using these opinions.

MR. GERVILLE-REACHE: Well, rules are sanctionable. Guidance isn't. So that's why I deem it not to be guidance.

CHIEF JUSTICE YOUNG: So do you regard the admonition in the rule to be consistent with good advocacy?

MR. GERVILLE-REACHE: No.

CHIEF JUSTICE YOUNG: You don't.

MR. GERVILLE-REACHE: No.

CHIEF JUSTICE YOUNG: Okay. So you believe showering a welter of unpublished opinions is good advocacy?

MR. GERVILLE-REACHE: No. I think the rule goes too far. That's why I don't think it's consistent with good advocacy. I think good advocacy would mean that if there is a published authority on point, you cite that. If it's stating a well-settled proposition of law that must be published authority, you cite that. I think this rule goes further than that, than just requiring you to do that. What it says is you have to explain why the published authority is insufficient on this issue. Now, this kind of- I'm going to blend my comments together here- Well, I've run out of time.

JUSTICE KELLY: You can finish. This is important.

MR. GERVILLE-REACHE: There are only fifteen states that cite against- that have rules against citation. That's compared to 35, 15 years ago. The national trend has been the head court allowing citation. This rule goes in the opposite direction and it goes further than even some of the rules that have this, you know, flavor of discouraging because there- it insufficient publish- There are some people who take the view that published authority is always sufficient. You can argue by extension, you can argue by analogy, you can say that it actually does cover this case. You can always use published authority and, in fact, 15 states think that it's always sufficient so they have a rule barring it altogether.

JUSTICE KELLY: Okay. Any other questions? Why don't- why don't you guys blog on this and we'll read your blog? To be continued on your blog, okay?

MR. GERVILLE-REACHE: Happy to do that. Thank you for your time.

[LAUGHTER]

JUSTICE KELLY: Okay, good. Mr. Schaefer.

CHIEF JUSTICE YOUNG: That would be from the Schaefer Firm.

MR. SCHAEFER: MR. Chief Justice, Interim Madame Chief Justice, distinguished, esteemed Justices. My- What I would seek here is to have some even treatment, and this goes directly to what Justice Viviano brought up a moment ago. The last time I appeared in front of the Court of Appeals, the presiding judge told me that I would go immediately to my room without dinner if I cited an unpublished opinion. Assume for one minute, hypothetically, that I commence an action for divorce in the Oakland County Circuit Court on behalf of a woman who's lived there for more than 10 days and has been a resident of the State of Michigan for more than 180 days. I have complied fully with MCL 552.9. Court has in rem jurisdiction, there's no question about it. There has been serious violence; I obtain a PPO from the judge in the circuit court to protect my client against serious abuse. The husband has consistently threatened to leave the country with 5 million dollars which is in a bank account and go to Brazil, outside the extradition powers of this country. I obtain an injunction tying up the bank account. He's got- on his electronic devices he's got evidence which would be

very incriminating. I get a spoliation order from the judge. I serve this on the defendant. The next thing that happens is that the wife's attorney comes in, to Justice Viviano's question, I mean the husband, excuse me, I'm representing the wife. The husband's attorney comes in and files a motion to dismiss the case on the basis of *Funk v Funk*, coming out of Michigan Court of Appeals April 2015. And which says, you must file an action for divorce in the county wherein the defendant resides. Wherein the defendant resides. And this defendant resides in Charlevoix County. But he moves to dismiss the case on the basis the ten-day rule is jurisdictional. And the judge says what am I supposed to do? And I say, well, *Funk v Funk*, Your Honor, only pertains to the Funks. And the Judge says well who told you that? And I say, well, I'm not sure, but I think in the trial court even, it follows the same thing in the Court of Appeals. It doesn't apply to anybody but the Funks. It's like a memorandum opinion. The judge says, I'm sorry, I'm going to have to dismiss the case. So the guy goes to the bank, grabs the 5 million dollars, and slashes his wife on the way out of town, taking his electronic evidence with him. This is a serious problem for the practitioner with dire consequences and I don't- I read Justice Markman's piece in here which was, frankly, Your Honor, if I may, absolutely brilliant in my estimation.

JUSTICE KELLY: Justice Markman is always brilliant.

MR. SCHAEFER: I know.

CHIEF JUSTICE YOUNG: Even when he's wrong.

[LAUGHTER]

MR. SCHAEFER: So, I'm sorry, thank you for kind attention-

JUSTICE KELLY: Thank you

MR. SCHAEFER: -but that's my concern as to what we do-

JUSTICE KELLY: That's a wonderful example, a real world example, and we need those.

JUSTICE BERNSTEIN: Counsel, can I just ask a question? Because I'm just following this very intensely. And I guess my question is, you know, because we've gone back and forth on this, but as judges we read these materials. We read the opinions, and don't you feel- I'm just, you know, I'm just kind of asking this just because I'm trying to kind of make a

determination as to what the balance here is. But don't you feel that when we read these opinions, we know they're unpublished, we know what they say, we know what they allude to, I mean, do you feel that in many situations that you can leave it up to the individual judges to review the materials in front of them and know the significance of materials in front of them and how to import those materials in rendering decisions?

MR. SCHAEFER: I think in general, yes. In this particular circumstance, this decision flies right in the face of 552.9. Now, I don't- I don't know what to make of it. It's- I don't know even how to advise a client.

JUSTICE MARKMAN: Mr. Schaefer, I think that you really put your finger on what, at least to me, to one Justice, is the dominant issue here. It's not whether judges or justices are not being conscientious or not publishing enough or lawyers are not being sufficiently diligent in researching and finding published or unpublished cases. The issue to me is whether or not our unpublished opinions are law or not; whether they're quasi-law or real law. Some obviously are very succinct and summary and can't be effectively cited and I understand that; these are the kinds of unpublished opinions that several of my colleagues have referenced, but where they are sufficiently analytical and sufficiently thorough to supply some rule of law in some coherent way, they apply to everyone in the state. These are not like Internal Revenue Service opinions that might apply to one individual – they are the law. And even a memorandum opinion is the law, although almost none of those are effectively citable precisely because they are so summary and succinct. But there are some unpublished opinions that may be suitable for citation. This is a judgment for the attorney, and of course he's got to run through the gauntlet of a judge, who may or may not disagree with his assessment, but you've put your finger, maybe in disagreement, but you've put your finger on the key issue: is this real law or is it something else?

MR. SCHAEFER: Thank you, Your Honor.

JUSTICE KELLY: Thank you once again, Mr. Schaefer, for being here. Okay, and next we'll hear from Randy Davidson of the State Appellate Defender's Office.

MR. DAVIDSON: Thank you. Good morning, may it please the Court. There are some numbers that the Court needs to be aware of before you make up your decision, one way or the other. And I'm talking specifically on 7.215 paren C. I did a survey in our

office, as of May, when we submitted our comment letter, of cases that SADO won relief for a client that were in a full Court of Appeals decision, and it turned out that there were 13 of them over a two-year period. Not one was published. All 13 were unpublished. Yesterday, in getting ready for speaking to the Court, I went on the Court's website and looked up how many published cases there were - and, criminal cases – in the past year - from October 1st through the second week of this month. It turns out there are 43. Seventeen of those, 40% of the time, the defendant got some sort of substantive relief. In 26 of those cases, 60% of the time, the State won. So just the numbers-

CHIEF JUSTICE YOUNG: I'm not sure what point you're making.

MR. DAVIDSON: Well-

CHIEF JUSTICE YOUNG: Because what we're talking about is whether those cases addressed, whether you won or not, novel issues of the law that would make them amenable to publication or whether they were routine errors that were corrected by the Court of Appeals in settle areas of the law. So what is the significance of the data?

MR. DAVIDSON: I can tell the Court that, again, anecdotally, in looking through our unpublished opinions that many of them were very thorough in their analysis. They were not one-paragraph memorandum decisions where this is so settled and the law was so obvious and the prosecutor confessed error, so SADO's client won. No, these were cases that went through and applied principles of the law – many of them, in fact, were quite lengthy. So what I'm telling-

CHIEF JUSTICE YOUNG: But were the issues novel? The legal issues.

MR. DAVIDSON: Some were. It's not just a matter of being novel, Mr. Chief Justice. And that brings me to the other point that I want to make. So much so in our field of law, and I'm speaking from 23 years of experience at SADO, that the published authority is frequently insufficient to address the issues because it's necessary, in order to be a good advocate, to give the Court many examples – relevant, but nevertheless, a number of examples of outcomes across a range of fact patterns in order to really flush out the law and give the decision-maker what they need to know to really understand how to apply the law.

CHIEF JUSTICE YOUNG: So how does this rule preclude you from doing that?

MR. DAVIDSON: Of course the rule doesn't preclude me from doing it, but what I'm saying, Mr. Chief Justice, is that almost every single brief that I file, I'm going to invoke the rule and I'm going to have to give the explanation with the footnote.

CHIEF JUSTICE YOUNG: But you'd give it anyway, wouldn't you?

MR. DAVIDSON: Well-

CHIEF JUSTICE YOUNG: You would never cite a range of unpublished cases without saying these cases demonstrate a uniformity of the legal principle stated in the published case, or whatever the justification for doing it. Because failure to do that is poor advocacy, right? You never want the Court to have to connect dots in your argument, correct?

MR. DAVIDSON: Yes.

CHIEF JUSTICE YOUNG: So how does this rule confound somebody who wants to be effective in their advocacy in the Court of Appeals?

MR. DAVIDSON: Well, Your Honor, for two reasons. Number one, it sends a signal to the decision-maker that not only are the cases not precedent, but somehow they're less worthy of consideration. I know the rule doesn't say that, but human nature being what it is, that's going to be the practical effect. Secondly, I like to think that I'm a skilled advocate and I do my job well, but I have to tell you, with many of the court-appointed attorneys with the Michigan Appellate Assigned Counsel System, that this rule is going to have a disproportionate effect because they won't even look at Court of Appeals unpublished opinions. They won't even research them. It's really going to have a disparate impact.

CHIEF JUSTICE YOUNG: For the bottom feeders of our profession are going to be dissuaded from doing adequate legal work because they have to justify these opinions, use of these opinions?

MR. DAVIDSON: I'm afraid so. I think it's really going to have a disproportionate impact because it's sending a message. Don't bother going through the unpublished opinions because you

really have to justify why you're using them and it says citation is disfavored.

CHIEF JUSTICE YOUNG: You're condemning quite a number of lawyers. You're saying there are people who are so incompetent, they won't do a lawyer-like job.

MR. DAVIDSON: Well what I'm-

JUSTICE KELLY: I'm not sure we're questioning their competence. A lot of times these are lawyers that have a lot of cases.

MR. DAVIDSON: Yes.

JUSTICE KELLY: They probably have more cases than they should, so they're busy and they might not have access to a computer system that they need to access these unpublished opinions, so it's their client that suffers-

MR. DAVIDSON: Yes.

JUSTICE KELLY: -more than the lawyer that suffers, and so the impediments that we're piling on now – the busyness of the schedule, the access to the utilities to get these- The harm comes to the client under what this conversation that we're now having.

MR. DAVIDSON: Exactly, Justice Kelly. That's exactly my point. That's the disparate impact.

JUSTICE KELLY: Well that's not a function of poor advocacy. That's a function of how criminal cases are assigned presently in our state, isn't that really the issue.

MR. DAVIDSON: Well, that's part of it, but Justice Kelly, I think this rule, if it's adopted, is going to just aggravate the situation by sending a message that don't even go there, it's really disfavored to cite unpublished cases, and frankly-

JUSTICE KELLY: Well the rule doesn't say it's disfavored to cite them, it simply imposes a burden on the lawyer to cite the case, I'm not sure that anywhere in the rule does it say it's disfavored, it simply-

MR. DAVIDSON: I'm afraid it does. The actual text of the proposed rule says, "citation to such opinions in a party's brief is disfavored."

JUSTICE KELLY: Excuse me, excuse me. You're correct, my apologies.

MR. DAVIDSON: And that's one of the problems with the proposal.

JUSTICE KELLY: I agree that- To me that is problematical, I agree.

MR. DAVIDSON: Yes. Thank you very much.

JUSTICE BERNSTEIN: Actually, counsel, I just have a question, just from a pragmatic perspective. How would you do that? You know in terms of you trying to meet your burden. Here you are, you're handling these cases, how would you go about trying to meet that burden? You find an unpublished case, you really want to use it. What would- I mean, I know you can't- You know, all facts are different, but how would you go about trying to meet that burden?

MR. DAVIDSON: I'll give you an example, Justice Bernstein, of what I did in a case and this would be a case where I would end up putting in the footnote saying, "in the opinion of this writer, the existing published authority is insufficient." The example I would give is a sentencing guideline departure. So even after *Lockridge*, departures have to be procedurally reasonable, which means they have to be adequately explained in a way to facilitate appellate review. Many of the cases applying this Court's *Smith* decision, which talks about how a court goes about procedurally explaining the reason for a departure and anchoring it with the guidelines and all the various factors. Many of the cases that have come out from the Court of Appeals since *Smith* have been unpublished, especially those which have said we're remanding back to the trial court because the judge didn't adequately explain the reason for the departure. So that's an example of an area of the law where I have, and where I anticipate I will have to cite unpublished opinions-

JUSTICE KELLY: Right.

MR. DAVIDSON: -not just Smith.

JUSTICE KELLY: That's a great example, thank you.

MR. DAVIDSON: Yeah.

JUSTICE KELLY: Okay. And thank you for being here today.

MR. DAVIDSON: Thank you very much.

JUSTICE KELLY: And next we'll hear from Mr. Harrington, Christopher Harrington.

MR. HARRINGTON: Good morning Your Honors, may it please the Court. Christopher J. Harrington, I am the co-chair of the Court Rules Committee of the Family Law Section and I'm here to represent the views of the Family Law Counsel and the Family Law Section. We voted unanimously- I guess what I'll do is I'll address subsection C(1) because that's been the big discussion here. We voted unanimously to oppose the proposed amendment, and I think that the Court really needs to focus on the use of the word "disfavor," and the negative implication that that creates with unpublished opinions. And I guess if the Court is considering, you know, when an unpublished opinion- when you would actually want to be able to use it, you know, that's fine to clarify that, but the negative implication that goes along with the word "disfavor," I think is problematic, and I think that there is a bleed down to the trial court level. I've had that experience trying to discuss a nuanced issue in front of the trial court, and judges sometimes they won't even listen to you, you know, and it can be very frustrating. So I think that's really where I want to focus that-

CHIEF JUSTICE YOUNG: So is it your view that if the rule said decisions- unpublished decisions shall only be used if they are justified, would that be?

MR. HARRINGTON: That would be- that would be better than I think, kind of disqualifying them by using the word disfavored. So, laying a criteria for when they can be used, I think, would be more constructive. I think the proposed language is kind of destructive to the use or well-thought out reasoning that we would hope we would find in those Court of Appeals opinions, I-

JUSTICE MARKMAN: So it's okay to disfavor unpublished opinions so long as you don't indicate that you're disfavoring unpublished opinions?

[LAUGHTER]

MR. HARRINGTON: Well, I think if the opinion is not on point, if it doesn't directly relate, you know, the Court of Appeals can do with it as they may. And do we need a court rule, you know, that might have an unintended consequence of creating a stigma about unpublished opinions, when they can be very helpful, especially in family law cases, an incredibly fact-dependent area of law, and a lot of times we have to fill in the gaps and I think that any court rule out there that says disfavored, I just think it does an injustice to be able to advance our arguments, so.

JUSTICE KELLY: Well said. I think that's- well, you're times not up, you've got more time.

MR. HARRINGTON: I- That's-

CHIEF JUSTICE YOUNG: You don't have to take it.

JUSTICE KELLY: That was great advocacy

MR. HARRINGTON: I don't want to trip on the five-yard line. I want to-

CHIEF JUSTICE YOUNG: That's good.

JUSTICE KELLY: Good.

MR. HARRINGTON: I want to get out while I can, so any other questions?

JUSTICE KELLY: Thank you.

MR. HARRINGTON: Thank you very much.

JUSTICE KELLY: You did a really nice job. Okay, Ms. Speaker.

MS. SPEAKER: Good morning again. I'm here, this time also, for the Michigan Coalition of Family Law Appellate Attorneys, and I wanted to point out that we were involved with the meeting with the Court of Appeals Rule Committee and actually four out of our six attorneys in the coalition were part of that meeting, along with the Appellate Practice Section. I also wanted to point out that our family law attorneys hold in high regard many of the judges of the Court of Appeals, including the two that were here today for their family law opinions. But we believe, as we've stated in our letters, that the rule proposal doesn't

address the concerns that the court was indicating to us at their meetings and in their comments. Today, they want to be persuaded as to why they should read an unpublished opinion, but the rule that they've written goes beyond that. It doesn't accomplish the task and it's overly-burdensome to attorneys and also, by disfavoring published opinions, having us explain why published authority is insufficient really puts a burden on an attorney to go through any possible published opinion, distinguish it, and then finally we can get to the unpublished authority. So what the Coalition did, as well as the Appellate Practice Section, have put forward two alternate proposals that I think in both instances accomplishes the task that the Court of Appeals is trying to seek in having better advocacy without becoming overly burdensome, which we believe the Court of Appeals proposal does.

CHIEF JUSTICE YOUNG: Could you just re- I was trying to- I can't boot them up. What were the alternatives?

MS. SPEAKER: Okay, so I have brought them with me. The proposal by the Coalition states – and it's in the May 28, 2015 letter – "An unpublished opinion is not precedentially binding under the rules of stare decisis. Therefore, a citation to an unpublished opinion must explain how the unpublished at issue directly relates to the case that is currently on appeal." So, persuade us. That's basically. And then just to go to the Appellate Practice Section, and just to clarify, I was still a voting member of counsel at the time that the Appellate Practice Section put forward its proposal and so I inherently agree with both even though they're slightly difference. The Appellate Practice Section which is contained in the May 21st letter states "Unpublished opinions should not be cited for propositions of law for which there is binding authority" – which addresses Judge Murray's concern – "and if a party cites an unpublished opinion, the party should explain the reason for citing it and why it is relevant." Again, persuade us why we should read it. And I think that is a lot of the goal and I think it could be accomplished by either of those proposed court rules, but the court rule that is on the table doesn't accomplish even the goals that the Court of Appeals has told us that they wanted to achieve.

CHIEF JUSTICE YOUNG: You have no objection to the earlier redefinition of the zone of opinions that should be published, do you?

MS. SPEAKER: No, Your Honor.

CHIEF JUSTICE YOUNG: Okay.

MS. SPEAKER: We agree with that.

CHIEF JUSTICE YOUNG: Okay.

MS. SPEAKER: Thank you.

JUSTICE KELLY: Thank you.

JUSTICE MARKMAN: Can I- Can I ask one question please?

MS. SPEAKER: Yes, Your Honor. I didn't hear who said that. Oh, Justice Markman.

JUSTICE MARKMAN: Do you think the changes that you're suggesting somehow alter the disfavoring of unpublished opinions, and if so, how? I mean, I'm not sure I understand what the difference is.

MS. SPEAKER: Because it doesn't use the word disfavor, I think it makes- Using the word disfavor really puts a chilling effect on attorneys who are trying to advocate for their clients. And further, having to go through any published opinion that might even indirectly relate to the case and explain maybe in a paragraph or a page why the published opinions that are out there are not really adequate before you get citing to the unpublished opinion. So I guess I'm not sure I understand your question. I don't think the proposals- The alternate proposals don't disfavor unpublished opinions, they're just-

JUSTICE MARKMAN: But yours retains this two-step process by which: A) you have to justify why you're citing an unpublished opinion and then B) Engage in a normal practice of explaining-

MS. SPEAKER: Right.

JUSTICE MARKMAN: -what the relevance of that unpublished opinion is to the case.

MS. SPEAKER: So there's two parts. One, the first part is the stare decisis that they're not binding. Unpublished opinions are not binding, everybody knows that. And the second part, which is not currently in the rule is that, tell us why you think it's helpful. And does that mean that we put less emphasis? I think some judges do put less emphasis on

unpublished opinions just because they're not binding. I think what we're hearing from the Court of Appeals is that in some cases there might be 20 unpublished opinions cited in it, it becomes a burden to the court to have to read every single unpublished case that's cited in any brief, and my response is, I mean, personally, I was surprised by that comment by the judges because I would think as an advocate, if I don't explain to the court, this is just good advocacy, if I don't explain to the court why they should read an unpublished opinion, I wouldn't have expected them to do so, but apparently they feel the burden to go through every single unpublished case even if they haven't yet been first persuaded to read it. But I don't think having the two-step process, to address your question, Justice Markman, I don't think that inherently says that unpublished opinions are disfavored. I think it just tries to elevate the advocacy at the Court of Appeals, although, among the conversations of appellate attorneys, putting this admonition, however it's phrased, in 7.215 is really not going to impact advocacy because the appellate attorneys, in my estimation, are already doing this and the people who are not being good advocates…

CHIEF JUSTICE YOUNG: I'm a consumer, a prior consumer, at the Court of Appeals and a consumer here, and I can assure you that there are a substantial number of people – not a majority, but a substantial number of lawyers who aren't as good as you and who do not adhere to the same level of advocacy.

MS. SPEAKER: And the point is, Your Honor, that whatever the language that is put into the court rule is not going to change that. Because the attorneys who are not advocating well for their clients are not reading those court rules and trying to become better attorneys, so it doesn't have the-

CHIEF JUSTICE YOUNG: So resistance is futile.

[LAUGHTER]

MS. SPEAKER: But it- the court rule language that's been proposed will affect appellate attorneys, the ones who are studying the court rules and trying assiduously to follow them.

JUSTICE MARKMAN: Can I ask you one final question? Do you consider the language that you've just shared with us sufficiently similar to existing language that no republication or public comment is required, or do you consider the changes to

be sufficiently distinct from what we have on the table to require that these be republished for public comment?

MS. SPEAKER: [pause] That is a really good question. They are very different, I think, than the language that has been proposed. I don't know that it's that different from the current rule to require additional public comment based on the number of comments that were received in the first instance. And I do take that question very sincerely because there have been other rules that changed a timeframe, for example, without public comment, and I think that that sort of situation is very different than here where we're talking about the contours of use of unpublished opinions and court rules, so I think we could move forward without another public comment, but I'm certain that if there is another opportunity, there will be plenty of attorneys who will-

JUSTICE KELLY: There'll be another tornado. [LAUGHTER]

MS. SPEAKER: -be willing to come here and speak to that issue.

ITEM NO. 7 (2014-15; MCR 6.106)

JUSTICE KELLY: Thank you so much, Ms. Speaker. Okay, our final speakers on this subject are splitting their time as co-chairs of the Criminal Issues Initiative of the State Bar of Michigan, as I understand it. So we have Erika Breitfeld and Valerie Newman.

CHIEF JUSTICE YOUNG: [inaudible] That's number- not number seven.

JUSTICE KELLY: Oh.

CHIEF JUSTICE YOUNG: Thanks. Number seven.

UNKNOWN SPEAKER: I'm happy to speak on any matter though.

CHIEF JUSTICE YOUNG: I know you are and ably, too.

[LAUGHTER]

JUSTICE KELLY: Yes. Indeed. Okay, so-

UNKNOWN SPEAKER: I could add to the debate.

JUSTICE KELLY: No, for point of clarification, we have no speakers on item number six. On item number seven, we have two speakers and, as I indicated, they are Ms. Breitfeld and Ms. Newman, as co-chairs of the Criminal Issues Initiative, and they are splitting their time.

MS. NEWMAN: We are not splitting our time; I'm ceding my time.

CHIEF JUSTICE YOUNG: Oh. Alright.

JUSTICE KELLY: You're ceding your time, that's even better.

MS. NEWMAN: I'm here for support.

JUSTICE KELLY: So you're not speaking

CHIEF JUSTICE YOUNG: Unless spoken to.

[LAUGHTER]

JUSTICE KELLY: Okay, Ms. Breitfeld.

MS. BREITFELD: Good morning, Your Honors, may it please the Court. My name is Erika Breitfeld and I'm here with Valerie Newman-

CHIEF JUSTICE YOUNG: Could- Excuse me, would you mind putting on the record what this is about?

JUSTICE KELLY: Oh, the issue, yes. Excuse me. You see, I'm not so good at this Chief Justice thing. So this is item number seven, and this issue is whether to adopt the proposed amendments of MCR 6.106 that would clarify courts are permitted to exercise their inherent power to order conditions that limit or prohibit a pretrial defendant's contact with any named person, even while the defendant remains in custody.

MS. BREITFELD: Thank you, Your Honors. Our committee answered Justice McCormack's four questions, or we tried to, Your Honor.

JUSTICE MCCORMACK: Thank you.

MS. BREITFELD: Thank you. And, our concern is that something needs to be done, but perhaps the proposed amendment is not the best solution and that it's going to create more

problems than it's going to solve. First, Your Honors, the proposed amendment suggests taking language that already appears under conditional release subset D and replicating it under subset B, which is pretrial custody, so it would pertain to a defendant that remains in custody that a court could issue a no contact condition. While that intent would be served, that both the defendant in custody as well as someone on conditional release would have the same type of condition, our fear is that the doctrine of *expressio unius* could come into play in the sense that now, under subset B, we would only have one type of condition expressly stated. Our proposal is to create a separate section in the rule, perhaps it could replace where the current B is, that would appear before the pretrial custody section, before personal recognizance, and before conditional release that would give the court the discretion it already inherently has, Justice McCormack, as you suggested, to grant any type of condition that may protect the integrity of the proceedings whether a defendant is in custody, subject to a personal bond, or on conditional release.

JUSTICE MCCORMACK: Do we need rules to tell judges that they have the power to do something they have the power to do?

MS. BREITFELD: No, we don't.

JUSTICE MCCORMACK: Okay. Just wondering.

MS. BREITFELD: But. I agree, Justice McCormack, however, this rule, on its face, is inconsistent within itself. There's nothing allowing a court to grant a custody condition when a defendant remains in custody, but then in that same rule goes through several types of conditions that the court could grant to someone on conditional release, and apparently it's causing an issue in the trial courts.

JUSTICE MCCORMACK: I've actually become convinced that sometimes it helps to dis- even if the judge- If the judges don't understand it, then maybe we should be doing more judicial education, but I don't think I object to reminding them that they have- You know, if it's helpful, if judges say it's helpful to reminding them, but you raise a good point about how we do it, yeah, that maybe we should think about, so I appreciate that.

CHIEF JUSTICE YOUNG: You think that the rule itself needs to be fixed because it's internally consistent.

MS. BREITFELD: Exactly.

CHIEF JUSTICE YOUNG: Whether we expand-

JUSTICE MCCORMACK: Well, and it might bind judge's hands in ways that we weren't predicting.

CHIEF JUSTICE YOUNG: Yes.

MS. BREITFELD: Correct. Under the proposal, it could have the effect of someone arguing, not that it's a very persuasive argument, but someone could argue that "Well, Your Honor, under Subsection B, the only condition expressly listed is this condition of a no contact condition."

CHIEF JUSTICE YOUNG: Is that- I'm sorry. Is that- the current rule, is the current rule, in your view, internally inconsistent?

MS. BREITFELD: Yes, Your Honor.

CHIEF JUSTICE YOUNG: Yeah. Okay. I thought that's what you were arguing, okay. But our rule doesn't fix that very well.

MS. BREITFELD: It doesn't, and perhaps it could create additional problems, and-

CHIEF JUSTICE YOUNG: Okay. That's what I thought, too.

MS. BREITFELD: We are, just to reiterate, proposing what we think would be a better served rule for clarity purposes. Thank you. Any other questions? [pause] Thank you, Your Honors.

CHIEF JUSTICE YOUNG: You sure you don't want to say anything?

UNKNOWN SPEAKER: [inaudible]

[LAUGHTER]

JUSTICE KELLY: Thank you.

UNKNOWN SPEAKER: Thank you Your Honor.

JUSTICE KELLY: We appreciate that.

UNKNOWN SPEAKER: Sorry, [inaudible]-

CHIEF JUSTICE YOUNG: You need a booster seat?

[LAUGHTER]

ITEM NO. 10 (2014-45; new MCR 5.731a)

JUSTICE KELLY: Okay, and the last item for which we have speakers is item ten, and we'll hear first from the chief- from Chief Judge David Murkowski of Kent County, and issue ten is whether to adopt the proposed new MCR 5.731a that would require clinical certificates in mental health proceedings to be marked and filed as confidential.

JUDGE MURKOWSKI: Thank you everyone. Good morning Mr. Chief Justice and fellow Justices. David Murkowski. I appear in front of you actually as the President-Elect of the Michigan Probate Judges Association. We ask, respectfully, that the amendment be rejected. We think that perhaps the purpose, perhaps laudable, is unattainable under this framework. Of course, there's approximately between fifteen and twenty thousand MI petitions filed in this state every year, and the statute requires with the filing of the petition two clinical certificates, one by a physician or psychiat- psychologist, and one by a psychiatrist. If you look at the statue, which is, and I understand being rewritten right now in two ways. One there's simply a proposal that's statutory that really mirrors the proposed court rule, and the other one I think is one that was worked on by then Judge Mack and Lieutenant Governor Calley, where I think is somewhere in the legislature. These petitions and the certs also trigger procedural requirements in our court, such as the setting of a date and the appointment of counsel by using these certificates which are asked to be sealed now. The statute requires service on the respondent and, depending on how the case unfolds, peace officers, the hospital director, nearest relatives and guardians, attorney for the respondent. The prosecuting attorney will get these because they are mandated by statute to move the case forward. The doctor will have them to testify, defense counsel-

CHIEF JUSTICE YOUNG: Can I-

JUDGE MURKOWSKI: I'm sorry.

CHIEF JUSTICE YOUNG: Can I just ask a question? I understand your general gist is not this. Is that correct?

JUDGE MURKOWSKI: I'm sorry?

CHIEF JUSTICE YOUNG: The general gist is: Please, not this particular rule.

[LAUGHTER]

JUDGE MURKOWSKI: The gist is that the statute is so porous that the effect of this in many ways, number one, is simply ineffective because so many people touch the certificates.

CHIEF JUSTICE YOUNG: My question is, is this an incurable problem, or is this- We've got a problem this rule doesn't fix or we can't possibly fix it?

JUDGE MURKOWSKI: I think that it could be fixed. I think that, as our comment said, we think that has to be required entire legislative overhaul, perhaps if the court or the legislature deems it appropriate, that the entire file may be sealed.

CHIEF JUSTICE YOUNG: I'm just trying to figure out what your position is. Are you saying "Get- Ignore it. Whatever the problem is, you can't fix it" or "you need to work on a better fix than you've come up with."

JUDGE MURKOWSKI: I think that you- You need a better fix than what is simply proposed.

CHIEF JUSTICE YOUNG: Okay. I understand.

JUDGE MURKOWSKI: The statute does provide confidentiality already if the respondent patient asks for an independent clinical certificate that is his or her property and is not revealed either to the court or to the prosecutor unless they wish to use that to- in their case. The practical issue from running a probate court is it's going to generate, in this case, 75,000 sheets of paper that have to be segregated. The other, I think, issue that the Court has to address is whether there is a transparency question, whether the public has the right to know whether- if there is a petition and two certs that are required either because the person is so dangerous – does this person's next door neighbor of the general public have a right to know by looking up-

CHIEF JUSTICE YOUNG: A *Tarasoff* right?

JUDGE MURKOWSKI: Pardon me?

CHIEF JUSTICE YOUNG: A *Tarasoff* right on the- a generic one, really?

JUDGE MURKOWSKI: Dange- Some of these people are dangerous. I think sometime- The argument can be made that the public may have a right to know and, most importantly, most of the I don't know if I want to say personal or lured information is not really contained in the certificates, it's contained in the petition that's written by, typically, the lay-person. So I think that the- If the goal is, from the proposed amendment, to correct information that's getting into the public, really, it's mostly, in our opinion, that it's the petition that holds most of the intimate details of the person's mental health.

CHIEF JUSTICE YOUNG: Thank you.

JUSTICE KELLY: Thank you.

CHIEF JUSTICE YOUNG: May I remark on how attractive your bow-tie is?

JUDGE MURKOWSKI: Thank you. Right back at you.

[LAUGHTER]

JUSTICE KELLY: Okay, and Mr. Sean Bennett is our final speaker this morning who will talk on the same issue.

CHIEF JUSTICE YOUNG: You didn't get the tie memo.

MR. BENNETT: I'm sorry?

CHIEF JUSTICE YOUNG: You didn't get the tie memo, huh?

MR. BENNETT: Yeah, well-

CHIEF JUSTICE YOUNG: I'm kidding.

MR. BENNETT: Well I'm glad to be here today before the Court, hopefully you can hear me, I can hear you okay-

CHIEF JUSTICE YOUNG: Yeah.

MR. BENNETT: I do have some very, very important issues that I want to be raised as the Court is looking at this

proposed revision, and I think, the general sense of people who understand psychiatric commitments and understand the history of psychiatric commitments is atypical in the judicial process. You're not suing somebody, it's not the criminal justice process, in both cases you have an elaborate protections of due process that go on for a long time. These commitments have traditionally, historically been known as kangaroo courts. Railroad, have been sham proceedings known to be decided by the doctors and the courts have traditionally just gone- Whatever the doctors say, the courts go along with 95% of the time. So that the- To understand the importance of these certificates is critical because they're very often dispositive of the fate of these proceedings. The commitments consist- The certificates, I'm sorry, consist of two things. They consist of the doctor's medical evaluation of the patient. That is, their healthcare assessment, it's called a diagnosis. And the second part of it is they have- they make a decision, a determination, or a prediction, I should say. They make a prediction as to the dangerousness of the patient. That's what the certificates do. They predict dangerous [sic] and they make a diagnosis. What- I think what the Court must understand as they look at this proposal and, my view on the proposal is, I think it is a step towards respecting the dignity and the privacy of patients, but I think that there- much more needs to be done. The central fact that I want this Court to be aware of is the unreliability of these physician's statements, in that the science is overwhelming that both in terms of medical diagnosis and predictions of violence, these certificates are unreliable under Daubert standards. In other words, they would not meet a Daubert test. The question also about biased – are the so biased that they should be considered not relevant, are they so prejudicial that their probative value is outweighed by their bias? Most of these doctors make a living with mental patients – the more patients the better. And the other issue you need to look at is fraud. Again, the history of psychiatry has been fraught with fraud and it certainly is- is a place where it's been abused in this certificates. So I think my- my- What I would encourage the Court to do is to look more broadly at should something finally be done to curtail the admission into court of these certificates? It's not just a matter of should we keep private the healthcare component of it, but do they long belong in court in general? And I have to say, I've done a lot of research, I do public policy research and advocacy. I can't tell you how overwhelming the scholarly opinion is that these certificates should not be allowed, should not be admitted, under the rules of evidence, and under the constitution should not be in the Court of Law. I can't tell you how much science- so that the

scientific community rejects the reliability of these clinical certificates as evidence. The real irony is, is why has the government been seeking, that is the executive and legislative, the legislative through the mental health code, and then, of course, the judiciary. Why has the government been seeking- been actively going out and saying, you know, "Mental health psychiatrists, we want your evidence," when the scholarly community says this evidence isn't any good. So here I am today as a whistleblower, as well as an advocate, hoping that I am notifying, I am sounding the siren to the Court. We have a real problem with these clinical certificates in terms of the way that they violate people's rights.

JUSTICE KELLY: I think you've done a great job of advocacy, and I think that your point, your bigger point, you know, is to- "do they belong in court at all?" has been well expressed, and I think that that's obviously a broader issue than the issue that we posed as to the sealing or confidentiality, but, we really appreciate when we have people like you that come forward and raise the issue, kind of give the issue a broader sense so that we think about it in its broadest terms.

MR. BENNETT: Yeah, as I was dressing this, I appreciate having this democratic process work, because realizing that when the judges step out is making rules and laws as you do in this case, then you want the democratic process to work, and I appreciate this. I was somewhat wondering, as I looked at this, the discretion you have, or the authority you have to- if you did make the determination, you looked into this and you agreed that these certificates have a real problem with their admissibility under the rules of evidence of the constitution, is this something you can unilaterally address or do you have to wait for someone to litigate it in through the court?

JUSTICE KELLY: Right. So our public sessions are for persons like yourselves to come and comment on proposed rules, they're really not dialogue sessions for the Court, so while I appreciate the question, it's really not something that we can answer.

MR. BENNETT: Alright, well I can get an answer some other time, but

JUSTICE KELLY: Right-

MR. BENNETT: -I'm hoping I'm doing a public service in letting people know we have a real problem here and anything

that can be done to give a little bit more respect to the persons who are subject to these often times sham, kangaroo proceedings, I think it's a step in the right direction.

CHIEF JUSTICE YOUNG: Let me just-

MR. BENNETT: I recognize the counter-argument that- Go ahead.

CHIEF JUSTICE YOUNG: Sir, let me just suggest something. Members of the public can actually make proposals for court rules, so if you think there's something that needs to be addressed, you might want to figure out whether there- it can be addressed by a court rule.

MR. BENNETT: And I see, under the rules of evidence there's a stipulation about if something's inconsistent with the constitution-

CHIEF JUSTICE YOUNG: I'm not really- I don't want to- I just wanted to offer you some- an opportunity-

MR. BENNETT: Alright.

CHIEF JUSTICE YOUNG: -to make a corrective action so that you had some idea how to proceed.

MR. BENNETT: Present it to you-

CHIEF JUSTICE YOUNG: Thank you.

MR. BENNETT: Yeah, alright. Thank you.

JUSTICE KELLY: Thank you. I really want to thank the Chief Justice, this really was fun and I had no anticipation whatsoever that my little quip would be taken seriously-

[LAUGHTER]

JUSTICE KELLY: So I do appreciate it.

CHIEF JUSTICE YOUNG: Well, Brian made me do it.

[LAUGHTER]

CHIEF JUSTICE YOUNG: So it's his fault. Thank you very much. We're concluded.